No. 91-141

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

THEODORE M. KUHN and the SOCIETY OF SEPARATIONISTS, INC.,

Respondents,

v.

CITY OF ROLLING MEADOWS and CITY COUNCIL OF ROLLING MEADOWS,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DONALD M. ROSE*
KATHLEEN ROSS
ROSE & ROSS, LTD.
4215 Kirchoff Road
Rolling Meadows, IL 60008
708/303-6100

Counsel for Petitioners

**Counsel of Record*

American Reprographics Management, Inc.™ (312) 332-2764

QUESTIONS PRESENTED

1. Whether plaintiffs in First Amendment cases attain standing by merely alleging it, or whether plaintiffs must, in response to a motion to dismiss, offer some proof of their allegations regarding standing?

2. Does the First Amendment prohibit sectarian religious imagery with an historical basis on any municipal seal?

THE PARTIES

The names of the parties to the proceeding are contained in the caption.

Petitioner, the City of Rolling Meadows, is an Illinois municipal corporation. The City Council is the elected, governing body of the City, and the Mayor is the elected head of the Council.

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THEODORE M. KUHN and the SOCIETY OF SEPARATIONISTS, INC.,

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v.

CITY OF ROLLING MEADOWS and CITY COUNCIL OF ROLLING MEADOWS,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, THE CITY OF ROLLING MEADOWS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on March 19, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported but is reproduced in the appendix at App. 1a.

The February 9, 1990, decision of the United States District Court for the Northern District of Illinois, which was reversed by the foregoing decision of the Seventh Circuit, is published

at 729F. Supp. 1242 (N.D. Ill. 1990) and is included in the appendix at App. 51a.

The February 22 and March 13, 1990 orders of the District Court making that decision applicable to the City were not reported but are included in the appendix at App. 66-7a.

The City filed a Petition for Rehearing, With Suggestion for Rehearing In Banc, which was denied June 10, 1991. The order denying rehearing is not yet reported but is reproduced in the appendix at App. 47a.

The City moved, and was granted, a stay of the mandate pursuant to Federal Rules of Appellate Procedure, 41(b).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion.

STATEMENT OF THE CASE

1. THE CITY'S SEAL

The City Seal of Rolling Meadows, drawn by an eighth grade student and adopted by the City in 1960, has caused this litigation. App. 54a.

Adoption of the seal was part of the City's Fifth Anniversary celebration. App. 54a. A contest to design the seal was held among the City's grammar school children, and a committee selected the design of Cheryl Knudsen as the winner. Cheryl, in an affidavit, stated of her motivation for the design, "I drew what I saw [and] had no purpose other than to complete an assignment." App. 55a.

The Rolling Meadows seal, in color reproduction, follows:

The seal appears on all City-owned vehicles, (except fire trucks), including police cars, on City vehicle tax stickers purchased by residents, on the shoulder patch of the uniforms worn by City police officers, on City stationery, and in the City Council chambers (App. 54a) and on any other property which the City wishes to identify.

2. THE PLAINTIFFS

The Society of Separationists is a Maryland corporation ". . . devoted to the complete and absolute separation of state and church. . . ."[1] which ". . .frequently represents. . . ." its members in actions such as this one, because:

> Due to the often unpopular or nonmajoritarian stance taking [sic] by persons or organizations involved in civil rights conflicts, the Society will represent its members, who generally have sufficient standing, when those members desire anonymity.[2]

Plaintiff, Kuhn, plead that he is a resident of Rolling Meadows and a member of the Society.[3]

3. THE DISTRICT COURT DECISION

The plaintiffs sued the City in District Court, alleging that the City's seal is unconstitutional because inclusion of a cross, even though it was mistaken for a utility pole by the Society's agent (App. 60a), taking up 0.8256% of the seal's surface[4] and positioned in front of a "nondescript one-story building"[5] violates the First Amendment.

Respondents invoked the jurisdiction of the District Court under 28 U.S.C. 1983; 1988; 1343(3), (4); 1331; 2201 and 2202. (Third Amended Complaint, page 1, paragraph 1)

The plaintiffs contended that the seal violates the constitution because, as to Kuhn:

i) the actions of the City ". . . denigrate his religious opinions and philosophical ideas . . . .";

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[1] Plaintiffs' Third Amended Complaint, at page 3, paragraph 10.

[2] Plaintiffs' Third Amended Complaint, at page 3, paragraph 11.

[3] Plaintiffs' Third Amended Complaint, at page 1, paragraph 3 and page 3, paragraph 11.

[4] Defendants' Memorandum in Support of Their Answer to Plaintiffs' Motion for Summary Judgment, at Exhibit E, filed December 13, 1988.

[5] Plaintiffs' Memorandum in Support of Motion for Summary Judgment, page 1.

ii) making him feel like an ". . . outcast or second class citizen somehow not worthy of full citizenship . . . .";

iii) He is ". . . constantly visually bombarded . . . ." by display of the seal; (Third Amended Complaint, paragraph 4)

and he was injured because

i) he had to display the City's vehicle sticker which has a copy of the seal;

ii) the City's garbage sacks have a copy of the seal; (Third Amended Complaint, paragraph 5)

iii) he receives ". . . many items of correspondence . . . ." from the City which contain the seal; (Third Amended Complaint, paragraph 6)

iv) he avoids the use of public property on which the seal is displayed; (Third Amended Complaint, paragraph 7)

v) ". . . he mightily strives . . . ." to avoid seeing the seal;

vi) "He will often avoid using the route to the downtown area of Rolling Meadows . . . ." where the seal is displayed; (Third Amended Complaint, paragraph 8)

vii) he is ". . . genuinely and substantially embarrassed and humiliated when he is called upon to show family and friends the City in which he lives due to the pervasive nature of the seal . . . ." ; (Third Amended Complaint, paragraph 9)

And the Third Amended Complaint alleged as to plaintiff, Society of Separationists, only that:

i) it is a Maryland corporation licensed in Illinois; a nonprofit, nonpolitical, educational organization;

ii) devoted to ". . . complete and absolute separation of state and church . . . .";

iii) its membership includes ". . . numerous individuals . . . ." in Illinois, the U. S., and the world; (Third Amended Complaint, paragraph 10)

iv) it ". . . frequently represents . . . ." its members in actions ". . . such as this one.";

v) due to the unpopularity of ". . . civil rights conflicts, the Society will represent its members, who *generally have sufficient standing,* when those members desire anonymity." ; [Emphasis added.]

vi) Kuhn is a member of the Society, as well as others who live, do business in, or travel through, the City of Rolling Meadows;

vii) the other members of the Society suffer ". . . many of the same injuries . . . ." as Kuhn; "The Society, having been requested to pursue this action, will fairly and adequately represent the interests of its members." (Third Amended Complaint, paragraph 11)

That's it! The District Court and the Seventh Circuit found that Kuhn, and consequently the Society, had standing. App. 10a.

The City moved to dismiss the Third Amended Complaint for failure of standing. The District Court denied the motion. App. 34a.

The Seventh Circuit Court of Appeals affirmed.

The District Court found that the cross on the City's seal did not violate the Establishment Clause of the First Amendment. App. 52a.

The District Court first noted the ". . . Supreme Court's most recent guidance . . . ." in *County of Allegheny v. American Civil Liberties Union,* 109 S. Ct. 3086, (1989) which reconfirmed the three part test set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971), and relied on *Lemon* to determine if the City's seal is constitutionally permissible. App. 59a.

At the outset, the plaintiffs conceded that the Rolling Meadows seal does not violate the "purpose" and "entanglement" parts of the *Lemon* test. App. 59a. Thus, the District Court had

but to determine whether the principal or primary effect of the Rolling Meadows seal is to advance religion. App. 60a.

Because of the physical context in which the cross appears on the seal, the District Court found that the primary effect of Rolling Meadows seal is not to advance religion. App. 60a.

The Court reached that conclusion because the cross represents but ". . . one aspect of the origin of the Rolling Meadows community.", each of the four pictures on the seal suggests a different feature of the community on its fifth anniversary, the cross is included in a scene, the abstract cross is not as strong a symbol of Christianity as would be a lone or prominent cross, (App. 61a) the cross takes up a "relatively small" space and is surrounded by other symbols which "neutralize" it. App. 62a.

The District Court also noted that while there may be crosses on municipal seals which endorse religion, Rolling Meadows

> . . . is not one of those seals. There would be no meaningful difference between holding otherwise and holding that no municipal seal may contain a cross. App. 62a.

4. THE COURT OF APPEALS DECISION

A divided panel of the Seventh Circuit reversed the District Court stating that:

> . . . we find that sectarian religious imagery simply has no place on municipal seals. App. 2a.

The majority opinion, written by Judge Bauer, and the dissent authored by Judge Easterbrook, engaged in a spirited debate with each first addressing the standing of the plaintiffs to bring the action.

The majority opinion acknowledged that "simple indignation" cannot be the basis for Article III standing, and the "overstated language" of Kuhn's complaint alleged injuries "however slight" of little more than "identifiable trifles" . App. 8-9a. Despite those disclaimers, the majority found that Kuhn had standing, anyway, because if he was ". . . not permitted

to sue, then there is simply no way to test the constitutionality of the city seals." App. 17a.

The majority then moved on to consider whether the cross on Rolling Meadows seal "established" a religion. App. 17a.

Judge Easterbrook dissented, vigorously, to the majority's conclusion that plaintiffs had standing. He observed that claims about detours are about as trifling as one can produce. App. 33a. Such trifles "sidle up" , he wrote, against the holding in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982) that mere offense at a government's alleged complicity in religion does not create standing. App. 33a.

Judge Easterbrook questioned why, if offense is not enough to establish standing, a detour attributable to that same offense establishes standing? App. 33a. The answer could not be, as the majority suggested, that ". . . detour 'validates the existence of genuine distress'. . . ." App. 33a. Since dismay does not establish standing pursuant to *Valley Forge,* the dissent contended, new and better ways to prove its existence cannot create standing either. App. 33a.

At the least, Judge Easterbrook argued, the plaintiffs ought to be required to "prove" the allegations of the trifles suffered. App. 34-5a. Judge Easterbrook doubted that Kuhn's allegations established standing, even if they could be proven. App. 36a.

Although Kuhn objected to displays of the seal, most of the locations in which the seal is displayed did not lead to an alteration, however slight, in his conduct. App. 36a. Moreover, those displays of the seal, which led him to alter his conduct, could be eliminated with the "simple self-help remedy" (App. 36a) provided in *Wooley v. Maynard,* 430 U.S. 705 (1977). App. 37a. Kuhn would then suffer no injury, in fact. Kuhn could edit the seal from his garbage bags and tax sticker, pursuant to *Wooley,* but he lacked standing to stop others from having or using the seals. App. 37a.

The dissent points out that Kuhn *never* alleged that he goes out of his way to avoid public displays of the Rolling Meadows seal. App. 37a. Kuhn alleged only that he was "embarrassed"

by the seal so he doesn't enter the public buildings where it is displayed. App. 37a. Those allegations were, Judge Easterbrook noted, a challenge only to the display of the seal in a particular place rather than an objection to its composition. App. 37a. The injury, the dissent concluded, could be eliminated by removing the seals from the public way. App. 37a. No seal, no detour, and no injury. App. 37a.

Judge Easterbrook's dissent reminds that Article III of the Constitution limits judicial power to cases and controversies. App. 38a. If because no one is injured there is no controversy, the suit must be dismissed: "There is no exception for subjects that as a result cannot be raised at all." App. 39a. The dissent observed that such a view would convert standing into a requirement that ". . . must be observed only when satisfied." *Schlesinger v. Reservists Committee to Stop the War,* 418 U. S. 208, 227 (1984) and *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 489 (1981). App. 39a.

As to the merits of the Establishment Clause case, the majority first declared its intent to

> . . . correct the district court's reluctance to apply the full breadth of Establishment Clause freedoms and to reiterate our commitment to an energetic first amendment. App. 17a.

The majority relied on *Lemon v. Kurtzman,* and *County of Allegheny v. American Civil Liberties Union,* just as the District Court, (App. 19a.) and found that only the "effects" test of Lemon need be applied. App. 20a.

The majority opinion concluded that because the U. S. Supreme Court held a nativity on the grand staircase of the court house in Allegheny County unconstitutional, then the cross on the Rolling Meadows seal was also unconstitutional. App. 21a. Moreover, since the creche in *County of Allegheny* was only displayed seasonally, while the Rolling Meadows seal is displayed all year, this is a more compelling case for finding the challenged display unconstitutional. App. 22a. The majority acknowledged that the "context" in which the creche was displayed in *County*

of Allegheny was crucial, but concluded that the rest of the Rolling Meadows seal did not keep the cross from being unconstitutional. App. 22a.

On the contrary, Judge Easterbrook, in his dissent, suggested that the Seventh Circuit "bypass *Lemon*" as Justice O'Connor has done, and, instead ask directly: would an objective observer view the seal as an endorsement of religion? If that is done, the dissent concluded, it will not be taken as an endorsement of religion since the cross on Rolling Meadows seal ". . . looks more like a telephone pole than a cross; its arms are too short to crucify anyone." App. 43a.

5. PETITION FOR REHEARING

The City's Petition for Rehearing was denied by the panel which heard the case. Judge Easterbrook, despite his earlier dissent, voted to deny the City's Petition for Rehearing so that the case could ". . . proceed without further delay to the Court that can resolve the issues the panel addressed." Citing *Lee v. Weisman,* 111 S. Ct. 1305 (1991) granting certiorari, 908 F.2d 1090 (1st Cir. 1990). App. 48a.

A majority, six, of the active members of the Seventh Circuit, voted to deny a rehearing in banc. Five voted to grant rehearing in banc. Judge Cudahy wrote a dissent to the denial of the rehearing in banc, Judge Manion joining. App. 47-8a.

Judge Cudahy shared Judge Easterbrook's misgivings as to Kuhn's standing to challenge the seal, in the first place. App. 48a. Judge Cudahy wrote that the District Court was correct in finding Rolling Meadows seal constitutional:

> Assuming that the diminutive symbol in question is a Roman cross—it might be a telephone pole—any message of endorsement is either non-existent or *de minimus*. There is little evidence of meaningful offense from the fancied religious implications of this ambiguous design—created by a schoolchild. App. 48a.

Judge Cudahy concluded his dissent by stating that "This important opinion needs careful reconsideration by the whole court and/or the United States Supreme Court." App. 50a.

REASONS FOR GRANTING THE WRIT

The majority opinion of the Seventh Circuit, that theplaintiffs in this case have standing, is a clear departure from the holding of this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Review of this case would provide the Supreme Court an opportunity to announce whether *Valley Forge* still holds, or whether pleading psychological injuries, will now suffice to establish standing in First Amendment cases.

The Seventh Circuit invalidated the City's seal purportedly on the basis of the "effects" test of *Lemon*. App. 21a. In doing so, it refused to consider the history of the seal, the context of the cross as but one of many symbols, or to assess it in light of other, traditional acknowledgments of religion which this Court has sustained. Eg. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

The merits of this case raise the question whether the application of the *Lemon* test to all Establishment Clause cases should continue, given its persistent tendency to invalidate some practices with substantial historical roots while letting other, similar expressions, survive.

I. STANDING

The majority opinion of the Seventh Circuit excused the plaintiffs, Kuhn and the Society, from proving, or even verifying, the factual allegations used to establish standing. App. 35a.

The City moved to dismiss[6] the Third Amended Complaint, *inter alia*, because Kuhn and the Society had not alleged standing. The City's motion pointed out to the District Court that

i) the bare allegation that the City's "action" resulted in an unnamed, abstract injury to Kuhn and the Society did not confer standing; (paragraph 4)

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[6] Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint for Failure of Standing and to State a Cause on which Relief Can Be Granted, filed December 22, 1987.

ii) nor did indignation; (paragraph 5)

iii) Article III limits judicial review to actual controversies; (paragraph 6)

iv) facts sufficient to show standing must always be plead; (paragraph 7) and

v) "Standing must never be assumed." (paragraph 7)

After Kuhn and the Society filed their answer to the City's motion to dismiss, it was even more apparent that neither Kuhn nor the Society had standing.[7] When reminded by the City that *Sierra Club v. Morton,* 405 U.S. 727 (1972) requires that facts sufficient to allege standing must be *plead* in the complaint, the plaintiffs made the astonishing assertion that:

> Plaintiffs' specific injuries are detailed in brief (sic) which accompanies this motion.[8]

to which the City replied:

> At some time, plaintiffs must realize that they cannot show standing by allusion, illusion and reference to matters other than those in the complaint.[9]

And at that, the only allegation of injury in the plaintiffs' brief was that the seal caused Kuhn ". . . great emotional distress and philosophical discomfort."[10]

In response to the City's challenge that no cognizable injury had been plead in any of the plaintiffs' four complaints, Kuhn answered:

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[7] Although ordered by the Court to answer the City's motion to dismiss, Kuhn and the Society filed a motion and brief in Opposition to Defendant's Motion to Dismiss, instead; both of which the City and the District Court treated as the plaintiffs' answer.

[8] Plaintiffs' Motion in Opposition to Defendants' Motion to Dismiss which was treated as an answer, at I, page 1.

[9] The City's Reply to Plaintiffs' Motion in Opposition to Defendants' Motion to Dismiss, filed January 15, 1988, page 2.

[10] Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, at 3.

> That Plaintiffs have standing to bring this 42 U.S.C., Section 1983, First Amendment action against the Defendants herein as they have suffered cognizable personal injury as a result of the inclusion in the official seal of emblem (sic) of the City of Rolling Meadows.[11]

Although completely nonsensical, plaintiffs' response illustrates their obstinate refusal to tell *what* injury they suffered.

In summary, Kuhn's pleadings show that he was able to allege only psychological consequences from the City's seal:

— he "feels" like an "outcast"; (Third Amended, par. 4)
— he "suffers" because of the City's seal; (par. 4)
— he "mightily strives" to avoid seeing the seal; (par. 8)
— he is "embarrassed" and "humiliated" by it. (par. 9)

That's why the City moved to dismiss because of the lack of injury, citing *Valley Forge Christian College.* Prior to the Seventh Circuit opinion in this case, psychological injury didn't count toward standing. *Valley Forge,* 765-6. To reach its conclusion, the Seventh Circuit majority opinion gave lip service, only, to the *Valley Forge* requirement that "simple indignation" cannot be a basis for Article III standing. App. 8a

Ironically, the majority ignored the previous holding of the Seventh Circuit in *Freedom from Religion Foundation, Inc. v. Zielke,* 845 F.2d 1463 (7th Cir. 1988), which was written by one of the majority in this case, and required some verification of the allegations of standing.

Since the City's Motion to Dismiss (for failure of standing) was filed December 22, 1987, some five months before the Seventh Circuit opinion in *Zielke* was published, that opinion was not available to guide the District Court in deciding *Kuhn v. Rolling Meadows.* Significantly, though, the City presented, nearly verbatim, to the District Court, the same principles for testing Kuhn's standing which appeared, months later, in the Seventh Circuit *Zielke* opinion:

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[11] Motion (Answer), at I, page 1.

The City of Rolling Meadows:

> Standing focuses on the *party* seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. [Emphasis in original.][12]

The Seventh Circuit in *Zielke:*

> An analysis of a litigant's standing to bring an action in federal court focuses not on the claim itself but on the *party* who is bringing the challenge. *Freedom from Religion Foundation, Inc. v. Zielke,* 845 F.2d 1463, 1467 (7th Cir. 1988) [Emphasis added.]

Yet, the Seventh Circuit majority opinion in *Kuhn v. Rolling Meadows* focused exclusively on the issues which Kuhn hoped to raise, rather than on him:

> . . . if Kuhn . . . [is] not permitted to sue, then there is simply no way to test the constitutionality of the city seals. App. 17a.

The majority in *Kuhn* has determined that he has standing because this is a very important First Amendment case, and if Kuhn is not allowed to bring it, perhaps no one else will.

Even so, the Seventh Circuit cannot cite one example from the record of injury to Kuhn and refers, instead, to the "burdens" imposed upon Kuhn by the City's seal. App. 8a. The subtle shift from the "injury" formerly mandatory for standing to a mere "burden", indicates a shift in the requirements for standing, at least in this Circuit.

The Seventh Circuit majority opinion in Kuhn is just plain wrong when it alleges that the City did not challenge Kuhn's allegations of injury. App. 13a. The City did object to plaintiff's allegations of standing: the gist of the City's Motion to Dismiss was that the City didn't know *what* Kuhn's injury was. Having lost the Motion to Dismiss, the City again raised standing as an affirmative defense that the complaint did not contain allegations of a "cognizable" injury. Finally, the City

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[12] Defendants' Reply to Plaintiffs' Motion in Opposition . . . at paragraph 2, page 4.

raised Kuhn's lack of injury (except psychological) in the Summary Judgment proceeding.[13]

Finally, the Seventh Circuit opinion does not address how the City might probe injuries so subjective that, really, only the pleader knows: Kuhn is "embarrassed", "humiliated" , "mightily strives", and has "philosophical discomfort". How could the City ". . . oppose Kuhn's statements that he seeks to avoid contact with the Rolling Meadows seal . . ." as the Seventh Circuit maintains it should have? App. 13a. Follow him with a video camera to show he did, in fact, drive by City Hall? Call him a liar and be done with it?

Only Kuhn knows what's in his head, and if he refuses to spill the beans and the Courts do not make him, then his injuries, other than indignation, embarrassment, and humiliation shall remain his secret.

Even taking Kuhn at his word that the seal causes him some degree of "philosophical discomfort", the City has long believed that he suffered no injury of the sort required by *Valley Forge*. This may be because the allegations are in "overstated language" (App. 9a) and, therefore, suspect. There is no way for the City to confirm these suspicions, however, and the majority opinion gives plaintiffs in First Amendment cases, a pass:

> For the purposes of standing, we need not consider if the plaintiffs can *prove* injury. It is enough that the plaintiffs, Kuhn and Harris, have pleaded good-faith allegations of damage that can be remedied by the federal courts. [Emphasis in original.] App. 9a.

Plaintiffs, hereafter, are apparently on the honor system when pleading standing in First Amendment cases.

The majority's view is that it does not matter whether plaintiffs cannot prove standing since that failure goes only to the issue of damages, anyway. App. 10a. That view is tragically flawed. Cases will be decided as here, where no Article III controversy exists. The time and fees for such a pointless crusade will already have been expended before it is ever known whether

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[13] Additional Memorandum on Summary Judgment, filed September 26, 1989, at 3.

the "facts" alleged for standing are merely an amalgam of buzz words from previous opinions or what a plaintiff has actually lived.

Perhaps the ". . . willingness of the plaintiffs to incur a tangible, albeit small cost that validates the existence of genuine distress . . . .", as the Seventh Circuit majority opinion put it (App. 9a) is a euphemism for a plaintiff simply saying what he must to get by.

If a constitutional claim rides on a detour, fine, but let's at least first make the plaintiff establish that there was, indeed, a detour. Simply saying it doesn't make it so.

II. THE ESTABLISHMENT CLAUSE

The Seventh Circuit found the cross on the City's seal to be ". . . surely a sectarian display." and, as an endorsement of Christianity, a violation of the First Amendment. App. 24a.

Since the nation has a tradition of acknowledging, forthrightly, its religious heritage ("In God We Trust" ; San Diego; prayers in Congress; ". . . one nation under God . . . ."), the Seventh Circuit's invalidation of the City's seal is at odds with national tradition and current practice. Unless, of course, there is a separate 'Federal standard' which makes unconstitutional for a unit of local government that which is acceptable for the Federal government.

Or is it a 'holiday standard'? What is otherwise a violation of the First Amendment is not if displayed on a holiday:

> The City's seal is a permanent statement that is viewed year-round, while the creche is displayed only seasonally amidst the secular celebration of Christmas. App. 22a.

So, we have, now, a holiday exception to the constitution. It seems that if a thing is unconstitutional when touched by government, then it is always so, no matter the day or occasion.

Or does constitutionality depend upon location rather than context, as the Seventh Circuit opinion suggests. App. 21a. The District Court, in this case, analyzed the cross on the City's seal

in the context in which it appears. App. 60a. That's what *County of Allegheny v. American Civil Liberties Union,* requires. Doing that, the only conclusion possible was that:

> . . . the seal before us cannot be fairly characterized as prominently displaying the cross. The question, as we understand it, is not whether a cross may appear in a municipality's seal; but rather, whether the context in which the cross appears has the effect of endorsing religion. There certainly may exist municipal seals that contain crosses and that convey messages endorsing religion. This, however, is not one of those seals. There would be no meaningful difference between holding otherwise and holding that no municipal seal may contain a cross. App. 62a.

The District Court viewed the entire seal and did not, as plaintiffs would prefer, focus on only the cross with tunnel vision. By focusing, as do plaintiffs, only on the 0.8256% of the seal taken by the cross, its significance is, of course, distorted. Plaintiffs hope this Court will ignore the context in which the City seal is found because it is reproduced in a setting which totally neutralizes any effect which the cross, if displayed prominently or alone, might otherwise have had, of establishing religion. App. 62a.

Yet, the Seventh Circuit majority opinion concentrates on *where* the seal is displayed: location, and brings up the secular context of the cross, with *what* it is included, only to signal an awareness of the U. S. Supreme Court Opinion in *County of Allegheny.* App. 21-2a.

Whether or not the challenged symbol fails the establishment test should depend upon what it contains, not where it is displayed. If the seal only acknowledges and does not establish religion, then it does not matter where or how the seal is displayed.

And what of coercion? Is government acknowledgment of the part religion has played in history a violation of the Establishment Clause, whether or not coercion is present? The Seventh Circuit majority mentioned coercion not at all; only the dissent raised the issue. App. 39a.

The "test" for establishment clause violations, which has evolved from *Lemon,* is a misnomer. From it, no standards nor criteria have resulted: only rulings which contradict each other and conflict with the everyday practices of other governmental actors, including this Court in *Marsh v. Chambers* and *Lynch v. Donnelly.*

Governmental accommodation or acknowledgments of the historical significance of religion are often sustained and, in doing so, the Courts seem to ignore *Lemon.* Perhaps this is where the 'Federal standard' comes in. The Federal government, when meeting "establishment" challenges, must neither take, nor pass, the *Lemon* tests.

For the City of Rolling Meadows, earnestly trying to comply with the constitution, the maze is indecipherable: this Court imposes a "test" which the City seal seems to pass, but then the Seventh Circuit holds the cross, unconstitutional, *per se:*

> The conspicuous depiction of the pre-eminent symbol of a particular faith on that seal conveys a message of approval that is simply inconsistent with the first amendment. App. 22a.

Is there really a test or are all crosses, even those that look like telephone poles, *per se,* unconstitutional?

> The Latin cross on the Rolling Meadows seal is surely a sectarian display. As such, we hold that it endorses Christianity in violation of the first amendment. App. 23-4a.

The City does not ask this Court to overrule *Lemon.* Rather, the *Lemon* test might be re-examined to determine if it is functioning as intended.

Judge Easterbrook's dissent points out that only four Justices relied on *Lemon* in *Allegheny,* and *Lynch* also "bypasses the Lemon 'tests' " altogether. App. 42a.

Indeed, many of the members of this Court have expressed misgivings with different aspects of the *Lemon* test: *County of Allegheny v. American Civil Liberties Union,* 109 S.Ct. 3086, 3134 (1989) (Kennedy, J., concurring in the judgment and

dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order"); *Wallace v. Jaffree,* 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Aguilar v. Felton,* 473 U.S. 402, 429, (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works,* 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. . . . . The threefold test of *Lemon I* imposes unnecessary and . . . . superfluous tests for establishing [a First Amendment violation]"); *Edwards v. Aguillard,* 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation . . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong").

So, while others, including some on this Court, have suggested that *Lemon* may be an inappropriate standard, the City respectfully suggests that its selective application creates even more uncertainty, chaos and frustration.

Finally, the evolution and application of the *Lemon* tests seem to have exceeded even the apparent intent expressed by Chief Justice Burger in the paragraph preceding that now famous one containing the "three tests":

> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." Citing *Walz v. Tax Commission,* 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). *Lemon v. Kurtzman,* 91 S. Ct. 2105, 2111 (1971).

What a long way, in subsequent application, *Lemon* has wandered from the three evils which its author addressed. Of course, the majority's discussion of the City's seal states that the cross "endorses", "promotes", (App. 21a) "conveys" and "approves" religion. App. 22a. Not once, though, does the opinion address whether the City "sponsors" a religion with "financial

support"; nor does it question whether the City is actively involved in religious activities.

None of the "evils" of establishment clause violations which Chief Justice Burger set out in *Lemon* have befallen anyone because of Rolling Meadows seal. It is "pallid". (App. 40a.) (Easterbrook, J.) It is difficult to discern how the City's seal failed any test which was passed, with honors, by "In God We Trust".

And what of history? Plaintiffs just simply refuse to recognize that the cross on the City's seal has historic significance. They complain that if it had ". . . well-known architectural, artistic or historic significance . . . ." viewers would assume that the seal was not an attempt to establish a religion.[14] Perhaps plaintiffs perceive historicity as only that offered by the wonderful old places in America, St. Louis, or St. Augustine. Rolling Meadows history started when it was incorporated in 1955, and the seal reflects the City, as perceived by a child, five years later:

* * * *

> 3. When an eighth grader, my art teacher assigned the project of drawing a City seal.
>
> 4. I did my assignment by drawing a four-leaf clover with the things I saw in Rolling Meadows: a tree in one section, a bird in one, a school in the third, and the new church being built in my neighborhood, in the last.
>
> * * * *
>
> 6. I drew what I saw, had no purpose other than to complete an assignment, and had no idea what the establishment of religion was, ...[15]

The Seventh Circuit discounted the intent of the seal's creator (App. 23a); yet, the Supreme Court in *Lemon* considered the "legislative purposes" of the statutes there challenged to see if

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[14] Brief for Plaintiffs-Appellants, 90-1673, in the United States Court of Appeals for the Seventh Circuit, at 11, 23.

[15] Defendants' Memorandum in Support of Their Answer to Plaintiffs' Motion for Summary Judgment, filed December 13, 1988, Exhibit A, Affidavit of Cheryl Knudsen Keifer, paragraphs 3, 4, and 6.

the establishment clause was violated and found ". . . no basis for a conclusion that the legislative *intent* was to advance religion." [Emphasis added.] *Lemon,* 2111.

Unfortunately, in this case, there is no preamble to the seal which can be studied in order to determine the motive for its adoption. But, the affidavit of Cheryl, its creator, is uncontroverted, that the seal was created in a secular setting for a wholly secular reason, and any benefit to anyone or anything was neither imagined nor intended, nor could it have been foreseen.

The Seventh Circuit has overlooked that when factual issues determine the constitutionality of governmental action, a Federal court may not hold a trial and use its own findings to upset the decisions of the political branches. *Vance v. Bradley,* 440 U.S. 93, 110-12 (1979). Even on matters touching the First Amendment, Courts must accept plausible judgments by other governmental actors. *Turner v. Safley,* 107 S. Ct. 2254, 2264-5n. (1987); *Munro v. Socialist Workers Party,* 107 S. Ct. 533, 537-8 (1986).

Rolling Meadows judgment in adopting Cheryl's seal was both plausible and constitutional in light of Justice O'Connor's concurring opinion in *Lynch*:

> Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their *history* and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. *Lynch v. Donnelly,* 465 U.S. 668, 693 (1984). [Emphasis added.]

To do otherwise is to compromise the First Amendment's guarantee of the free exercise of religion. The goal of the First Amendment is free exercise, to which nonestablishment is instrumental. Nonestablishment should not be used to rewrite history or repudiate the obvious.

But worse, framed as this case is, by atheists, their success will be a signal that nonreligion or anti-religion is the attitude preferred by the Federal Courts. The action of the Court in removing a cross would not be "neutral". It would have the "effect" of giving those who recognize the genesis of the seal, whether or not they have a religious axe to grind, constitutional grievances of their own.

If the plaintiffs are allowed to use the Constitution merely as a scissors to snip inclusion of all things religious from municipal history, history will, indeed, have been skewed. While the Establishment Clause is read to keep governments from setting up churches, it is not a license to eradicate the part religion has played in history, either.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted and the case set for plenary review.

Respectfully submitted,

DONALD M. ROSE*
KATHLEEN ROSS
ROSE & ROSS, LTD.
4215 Kirchoff Road
Rolling Meadows, IL 60008
708/303-6100

Counsel for Petitioners

**Counsel of Record*

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-1542

CLINT W. HARRIS and
THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellees,

v.

CITY OF ZION, LAKE COUNTY, ILLINOIS,
MAYOR OF ZION and ZION CITY COUNCIL,

Defendants-Appellants.

Appeal for the United States District Court
for the Northern District of Illinois.
No. 87 C 7204—**James B. Zagel**, *Judge.*

No. 90-1673

THEODORE M. KUHN and
THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellants,

v.

CITY OF ROLLING MEADOWS, MAYOR OF ROLLING MEADOWS
and ROLLING MEADOWS CITY COUNCIL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois.
No. 87 C 7205—**James B. Zagel**, *Judge.*

ARGUED SEPTEMBER 17, 1990—DECIDED MARCH 19, 1991

Nos. 90-1542 & 90-1673

Before BAUER, *Chief Judge*, FLAUM and EASTERBROOK, *Circuit Judges*.

BAUER, *Chief Judge*. In these two appeals, consolidated for decision in the district court, we are asked to determine whether the Establishment Clause of the first amendment prohibits the use of sectarian religious symbolism on a municipality's corporate seal. In both cases, we find that sectarian religious imagery simply has no place on municipal seals.

In *Kuhn v. City of Rolling Meadows* and *Harris v. City of Zion*, both at 729 F. Supp. 1242 (N.D. Ill. 1990), the Society of Separationists ("Society") and two of its members, Theodore M. Kuhn and Clint W. Harris, filed suit against the cities of Rolling Meadows and Zion, respectively, as well as against their mayors and members of their city councils in their official capacities, under 42 U.S.C. § 1983. Both suits seek declaratory and injunctive relief. The plaintiffs in each case claim that the seal of Rolling Meadows and the seal, emblem and logo of Zion violate the Establishment Clause of the first amendment because they contain Christian symbolism. All parties moved for summary judgment under Fed. R. Civ. P. 56.

The district judge drew a fine distinction between the two cases. In *Kuhn*, the district court found that, although the official seal of Rolling Meadows contains a Latin cross, it does not violate the first amendment. Thus, the court denied the plaintiffs' motion and later entered judgment for the City of Rolling Meadows. In *Harris*, however, the district court found that Zion's seal, emblem and logo do present constitutional violations. The court granted the plaintiffs' motion for summary judgment, enjoining Zion from further use of its current seal, emblem and logo. Theodore M. Kuhn and the Society (plaintiffs in *Kuhn*) and the City of Zion (defendant in *Harris*) appealed. Finding that both the seal of Rolling Meadows and the seal, emblem, and logo of Zion represent unconstitutional uses

of religious imagery, we reverse the district court judgment in *Kuhn*, and affirm in *Harris*.[1]

I. Background

A Rolling Meadows

Rolling Meadows adopted its current seal in 1960, in celebration of the City's fifth anniversary. The seal was designed as a school art assignment by Cheryl Knudsen, then an eighth grade student at the Salk School in Rolling Meadows.[2] Knudsen simply drew the things she saw in Rolling Meadows: inside her design of a four-leaf clover, she drew a tree in one section, a bird in another, a school in the third, and the new church being built in her neighborhood in the last section. The anniversary committee that presented the winning design to the City Council for approval altered Knudsen's design somewhat. The tree was changed to a leaf, and the bird was replaced by a water tower and two industrial buildings. The neighborhood church was retained. This final design was approved by the Rolling Meadows City Council in June 1960. (See Appendix A for Rolling Meadows seal.) The Rolling Meadows seal is displayed on all City-owned vehicles, including police patrol cars. The seal is also found on City letterhead, on

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[1] With no material issues of fact in dispute, the district court ruled on the motions for summary judgment as a matter of law. It is well-settled that whether a government display violates the first amendment is indeed a question of law. *See Mather v. Village of Mundelein*, 864 F.2d 1291, 1292 (7th Cir. 1989); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 123 (majority opinion), 129-30 (7th Cir. 1987) (J. Easterbrook, dissenting). Thus, on review we examine the issues *de novo* with "no deference to the district court's resolution." *Mather*, 864 F.2d at 1292.

[2] There is some dispute in the record concerning the school that Knudsen attended and her grade in that school when she designed the seal. As the district court properly found, these facts are irrelevant, having no bearing on the larger issues in the appeal. Resolution of such disputes is therefore unnecessary.

the shoulder patches worn by uniformed members of the Rolling Meadows Police Department, on the residents' garbage sacks, on vehicle tax stickers, and in the City Council chambers.

Kuhn and the Society sued, objecting to the Latin cross (i.e. a cross whose base stem is longer than the other three arms) in the right quadrant of the Rolling Meadows seal. This cross stands prominently before a one story building—the church that was under construction in Cheryl Knudsen's neighborhood back in 1960. While the building depicted in the right quadrant of the seal is not obviously a church (its flat appearance could suggest another industrial building or a school), there is no doubt that the structure in front of the building is a Latin cross. There also can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today. *See American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir.) (enjoining St. Charles' prominent display of a lighted Latin Cross as part of the municipality's annual Christmas display), *cert. denied*, 479 U.S. 961 (1986).

Kuhn and the Society claimed that the presence of the cross on the Rolling Meadows seal promotes or endorses Christianity and, thus, violates the first amendment which prohibits any law "respecting the establishment of religion." U.S. Const. amend. I. The district court found that, in the context of the Rolling Meadows seal, the relation between the cross and Christianity is weak. The court believed that the other images in the seal—specifically, the leaf, the industrial scene and the school—"neutralize" the sectarian impact of the cross and preclude any unconstitutional endorsement of Christianity. *Kuhn*, 729 F. Supp. at 1248. From this decision, Kuhn and the Society appealed.

B. Zion

To understand the genesis and design of Zion's corporate seal, emblem and logo, we must consider the rather

unique history of the City. In 1896, the Reverend John Alexander Dowie founded the Christian Catholic Church, an evangelical protestant sect that still flourishes today in a world-wide fellowship. Six years after the founding of the Church, Reverend Dowie established the City of Zion in Lake County, Illinois, in March 1902. The May 3, 1902 edition of "Leaves of Healing," the Church newsletter edited by Dowie, explains the reasons for which Zion was founded: "Zion City . . . is being built for the purpose of the extension of the kingdom of God upon earth . . . where God shall rule in every department of family, industry, commercial, educational, ecclesiastical and political life."

At the first meeting of the Zion City Council on May 6, 1902, Reverend Dowie, who had assumed the title "General Overseer of the Christian Catholic Church in Zion," presented the new City Council with a proposed corporate seal. This proposed seal consisted of a shield draped with a ribbon that reads "God Reigns" and encircled by the words "Corporate Seal" and "City of Zion, Illinois." The shield lies in the center of the seal and is divided into four sections. Each section contains a different symbol. The left section contains a Latin cross; the upper section contains a dove carrying a branch; the right section contains a sword and a crown; and the lower section contains the name "Zion." In presenting the proposed seal to the Zion City Council, Reverend Dowie urged:

> I ask you to accept (this seal) and use it reverently. Let no hand ever hold this lever and put this seal to anything that God does not approve. Let the officer who uses this seal feel, as he pulls this lever and makes this impression, "God Reigns," that the document must be such a one as God approves.
>
> May every commission of every officer which bears the seal of this City be looked upon as solemn thing; that it is a commission to bear such authority, however small or great, as God's minister—God's minister in law—God's minister in the Eternal Covenant in a measure.

Minutes of First Council Meeting, City of Zion, May 6, 1902. Reverend Dowie also explained the meaning of the symbols included in the seal:

> Look at the Dove which is the emblem of the Holy Spirit, bearing the Message of Peace and Love over the seas. The Cross represents everything to us in Redemption, Salvation, Healing, Cleaning and Keeping Power. The Sword is the Sword of the Spirit, which is the Word of God. The Crown is the Crown of Glory, the Crown of Joy, the Crown of Righteousness, the Crown of Rejoicing.

Id.

The City Council unanimously approved Reverend Dowie's proposal, and his design has remained the corporate seal for the City of Zion until the present day.[3] (See Appendix B for the Zion seal.) The Zion City Council later designed the City's emblem and logo. The emblem is simply the central part of the seal, consisting of the shield with its four sections, and the ribbon that reads "God Reigns." The logo also is derived from the seal. The logo is circular and contains a large "Z." To the left of the "Z" lies a Latin cross; to the right of the "Z" lies the crown and the scepter; and above the "Z" flies the dove carrying the branch. (See Appendices C and D for the Zion emblem and logo.) The seal or emblem appears on the City flag, on the City letterhead, in the City Council chambers, on City vehicle stickers of all vehicles operated by Zion residents, and on the shoulder patches of City police officers and fire fighters. The logo appears on the Zion water tower and on City street signs.

The district court found that the images displayed on the Zion seal, emblem, and logo function as strong symbols of a particular sect of Christianity with nothing to

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[3] The sword in the right section of the shield was later changed to a scepter. This is the only variation in Zion's present seal from Reverend Dowie's original design.

"neutralize" the religious message. "The City of Zion's seal, emblem and logo have the effect of endorsing a Christian message. Nothing more is required to demonstrate a violation of the Establishment Clause." *Harris v. City of Zion*, 729 F. Supp. at 1250 (quoting *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3105 (1989)). Thus, the district court granted the motion for summary judgment of Harris and the Society and permanently enjoined the display of Zion's seal, emblem or logo in their current forms. The City of Zion appealed.

II. Discussion

A. Standing

The first issue we must consider is whether the plaintiffs have standing to maintain this suit. Because Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases and controversies," the authority of federal courts "cannot be defined, and indeed has no substance, without reference to the necessity to adjudge the legal rights of litigants in actual controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1981) (quoting *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). *See also Allen v. Wright*, 468 U.S. 737, 750 (1983). To have standing, the plaintiff must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1961).

In order to establish a "personal stake" in the case, a plaintiff must show that he has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ." *Warth v. Seldin*, 422 U.S. 490, 499 (1974) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)). *See also Moose Lodge No. 107 v. Irvis*, 407 U.S.

163, 166-67 (1972); *Flast v. Cohen*, 392 U.S. 83, 101 (1968). That injury must be fairly traceable to the challenged action of the defendant, and it must be likely to be redressed by a favorable decision. *Valley Forge*, 454 U.S. at 472. The requirement that the plaintiff allege an "injury-in-fact," whether economic or non-economic, excludes simple indignation as a basis for Article III standing. That the plaintiffs may be offended by the defendants' conduct is not enough to confer standing. *St. Charles*, 794 F.2d at 268. *See also Allen*, 468 U.S. at 751 ("The injury alleged must be 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.' ") (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) and *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)); *People Organized for Welfare and Employment Rights v. Thompson*, 727 F.2d 167, 171 (7th Cir. 1984) ("The injury brought about by a violation of law must . . . affect one's possessions or bodily integrity or freedom of action, . . . and not just one's opinions, aspirations or ideology.") The federal courts simply are not constituted as "ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487.

With these general considerations in mind, we turn to the plaintiffs' claims. Because the Society alleges no injury to itself, its standing depends on that of its members: the individual plaintiffs Kuhn and Harris. *Valley Forge Christian College*, 454 U.S. at 476 n.14; *Warth*, 422 U.S. at 511; *St. Charles*, 794 F.2d at 267. Kuhn and Harris each allege several direct burdens imposed on them by the presence of the religious symbols in the City seals.[4] Kuhn claims he is injured by the requirement that he display the Rolling Meadows seal, which is depicted in the municipality's vehicle tax sticker, on the windshield of his automobile; that he is likewise required to dispose his household refuse in garbage sacks that display the seal;

[4] Although Kuhn and Harris allege that they are taxpayers, they do not claim injury from any expenditure of tax revenues by either city to display or maintain the seals. Thus, their status as taxpayers is irrelevant. *See St. Charles*, 794 F.2d at 267.

and finally, that he "mightily strives to avoid any visual contact" with the Rolling Meadows seal by utilizing alternative travel routes. Harris alleges similar types of injury—that he is required to display on his automobile the Zion vehicle tax sticker which, like the Rolling Meadows sticker, contains the City's seal, and that he too "mightily strives" to avoid viewing Zion's seal, emblem or logo by altering his travel routes. Specifically, Harris alleges that he avoids the particular route that brings him within visual contact of Zion's water tower which exhibits the Zion logo. Following our decision in *St. Charles*, 794 F.2d 265 (concluding that the ACLU had standing to challenge the lighted cross in St. Charles' Christmas display), the district court held that both Kuhn and Harris alleged sufficient injury to confer standing on these plaintiffs. We agree.

Regardless of the overstated language of the complaints, the plaintiffs' alleged injuries, however slight, are indeed judicially cognizable. As the Supreme Court stated, "An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1972) (quoting Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)). The injuries claimed by Kuhn and Harris are little more than "identifiable trifles." As noted above, the fact that the plaintiffs may be offended by the seals of Rolling Meadows and Zion does not confer standing. It is the willingness of the plaintiffs to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction. *St. Charles*, 794 F.2d at 268. *See also Saladin v. City of Milledgeville*, 812 F.2d 687, 690-692 (11th Cir. 1987) (appellants had standing to challenge the constitutionality of the Milledgeville seal which contained the word "Christianity" in the center of the seal).

For the purposes of standing, we need not consider if the plaintiffs can *prove* injury. It is enough that the plaintiffs Kuhn and Harris have pleaded good-faith allegations of damage that can be remedied by the federal courts.

The test for standing, as for jurisdiction generally, is what the complaint alleges, not what the evidence shows. *St. Charles*, 794 F.2d at 269. "If a plaintiff merely fails to prove injury, his failure goes to damages (or in an equity case like this, to the right to obtain an injunction), rather than to jurisdiction." *Id.* That the allegations of a complaint may be sufficient to confer standing also is supported by *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027, 1034 (7th Cir. 1982), where this court declared:

> A challenge to standing does not justify an inquiry into the strength of a complaint. Questions of standing deal exclusively with whether the plaintiff alleged facts satisfying the constitutional and prudential limitations of the doctrine. The ability of the complaint on its merits to survive a summary judgment motion or support an award in law or equity after a full trial is irrelevant. . . . Consequently, the district court considering a motion to dismiss for lack of standing accepts all material allegations in the complaint as true and liberally construes the document in favor of the plaintiff.

Id. at 1034 (citations omitted). Thus, Kuhn and Harris have sufficiently alleged a personal stake in this litigation to justify the exercise of the court's remedial powers on their behalf. The litigants, then, have standing to maintain these suits.

In his dissent, *infra* at 33, Judge Easterbrook disagrees with our analysis. He doubts that Kuhn and Harris experience the sort of injury necessary for standing. Judge Easterbrook cites *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), to suggest that Kuhn and Harris may not sufficiently have "proved" their injuries. We disagree with this interpretation. Conferring standing upon Kuhn and Harris in no way conflicts with *Lujan*. On the contrary, Kuhn and Harris fully satisfy the logic of *Lujan*.

In *Lujan*, a national wildlife group challenged the entire "land withdrawal review program" of the Bureau of

Land Management. This program determined the status of public land and its availability for private uses such as mining. The plaintiffs claimed a right to challenge the Bureau's decisions under § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Supreme Court determined that the plaintiffs did not satisfy § 702's requirements for judicial review because they failed to identify an "agency action" within the meaning of § 702. The court held that neither the allegations of the complaint nor the supporting affidavits "enable the respondents to challenge the entirety of the so-called 'land withdrawal review program.'" *Id.* The Supreme Court, then, denied standing because the plaintiffs failed to meet the statutory requirement that they be adversely affected or aggrieved by an agency action.

We note that in its discussion of standing, the *Lujan* Court focused on the allegations of the complaint and turned to the affidavits to search for any saving support. At no time did the Court state that well-pleaded allegations of the complaint, if they appropriately identified an "agency action," would not be sufficient to confer standing. *See* 110 S. Ct. at 3189-93. The failure of the plaintiffs—evident in both the complaints and affidavits—was that they sought "wholesale improvement of the [Bureau's] program by court decree, rather than in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made." *Id.* at 3190.[5]

[5] Even if *Lujan* somehow is read to stand for the dissent's proposition that the plaintiffs must be "put to their proof," the instant cases are clearly distinguishable from *Lujan*. *Lujan* involved judicial review of an administrative action; standing to challenge such an action was determined by statutory interpretation. In *Kuhn* and *Harris*, we must grapple with the meaning and implication of the first amendment. Standing for Establishment Clause claims should be determined primarily by applying the well-settled law from prior Establishment Clause cases, not by applying an ill-suited analysis from an inapposite case.

Thus, when the dissent suggests that, after *Lujan*, Kuhn and Harris "must do more than allege; in response to a motion for summary judgment, they must produce affidavits showing the essential kind of injury," it blurs the distinction between the allegations sufficient to confer standing and the evidence necessary to support a motion for summary judgment. As to the former, our above review of the plaintiffs' well-pleaded allegations makes clear that Kuhn and Harris have adequately alleged palpable injuries. But as to the latter, we need consider further both the governing law and the record to assess the dissent's argument that Kuhn and Harris have not sufficiently proved their allegations of injury. Such an examination leads us to conclude that the claims of Kuhn and Harris do not suffer from a failure of proof.

Rule 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). These two sentences were added in 1963 to overcome the line of cases, chiefly in the Third Circuit, which had impaired the utility of the summary judgment device by permitting the adverse party to rest on the pleadings, which on their face may present a genuine issue for trial. Rule 56 requires, then, that the adverse party present some evidence to block a grant of summary judgment for the movant. *See* Notes of Advisory Committee on Rules, Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ("[Rule 56] requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate spe-

cific facts showing that there is a genuine issue for trial.") (quotations omitted).

A close examination of the record demonstrates the correctness of the district court's finding that no material facts were in dispute, making summary judgment an appropriate resolution of these cases. The Cities of Rolling Meadows and Zion simply failed to challenge the factual allegations of injury that Kuhn and Harris declared in their affidavits. For instance, in its answer to Kuhn's motion for summary judgment, Rolling Meadows neglected to oppose Kuhn's statements that he seeks to avoid contact with the Rolling Meadows seal and that the City would not collect his personal refuse because he refused to place the garbage in the official bag that depicts the objectionable seal. Instead, the city argued that the seal does not endorse religion. To that end, Rolling Meadows submitted affidavits from several individuals to demonstrate the absence of any sectarian endorsement.[6] By its failure to challenge the declarations of injury in Kuhn's affidavit, the City of Rolling Meadows accepted those statements as true, and waived any claim that Kuhn's allegations of injury present a triable issue.

Similarly, in *Harris*, the City of Zion also failed to challenge Harris's declarations of injury contained in his affidavit. Harris stated that he avoids certain routes that bring him within visual contact of the Zion seal. Nowhere does the City challenge these averments. Thus, like Rolling Meadows, Zion must be deemed to have accepted these declarations; therefore, there is no genuine issue of fact suitable for trial concerning Harris's injuries. As Fed. R. Civ. P. 56(e) and *Celotex* instruct us, one of the principal

[6] Specifically, Rolling Meadows submitted the affidavits of Cheryl Knudsen Keifer, the school girl who designed the seal, Phil Prete, a 1960 alderman of the city who participated in the seal's adoption, William Ahrens, a Rolling Meadows public official who declares that the seal's purpose is not to establish religion, and James Muldowney, an engineer who measured the actual space that the image of the cross occupies on the seal.

purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. 477 U.S. at 324. The district court correctly employed the mechanism of summary judgment in determining that Kuhn and Harris provided sufficient, uncontested allegations of injury.[7]

The dissent also employs a touch of hyperbole to add vigor to its arguments. When discussing why the *Harris* case "looks like a put-up job," the dissent compares Harris's claims of injury with the allegations in *St. Charles* and *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990). The dissent describes how the plaintiffs in those earlier cases were compelled by religious scruples "to change the pattern of their lives." For Harris, the seal is only "an attractive nuisance, not an irritant compelling changes of the sort we discussed in *St. Charles* and *Crestwood*." *Infra* at 34. But what, in fact, were the injuries in *St. Charles* and *Crestwood* that so outweigh the injuries of Kuhn and Harris? In *St. Charles*, the plaintiffs argued that "they were so offended by the lighted

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[7] In developing its argument that Kuhn and Harris have failed in their proofs, the dissent mischaracterizes the record. For example, the dissent states: "[D]espite what the majority says, Kuhn does *not* allege that he goes out of his way to avoid public displays of the seal. His affidavit omits any such assertion, contending instead that he is embarrassed by the seal, and he does not enter public buildings where it appears." *See infra* at 37 (emphasis in original). These statements are not accurate. First, as we have described, Kuhn alleged specifically in his complaint (which is, of course, the primary focus of the standing inquiry) that "he will often avoid using the route to the downtown area of Rolling Meadows . . . where the seal of the City of Rolling Meadows is most prominently displayed." *See* Third Amended Complaint, para. 8. Second, in his affidavit submitted in support of his motion for summary judgment, Kuhn states: "In order to avoid seeing the Rolling Meadows seal, I avoid public offices of the City of Rolling Meadows such as the City Hall and the Public Works Building." *See* Affidavit of Theodore M. Kuhn, para. 5. As we discuss above, the city never challenged this statement of injury. Nowhere in his affidavit does Kuhn state that he is "embarrassed" by the seal.

cross that they departed from their accustomed routes of travel to avoid seeing it." 794 F.2d at 267. Such an injury was sufficient to confer standing on that plaintiff. (We note that the objectionable government exhibit in *St. Charles*, the lighted cross on top of the firehouse, was displayed only at Christmas time for, at most, five weeks per year.) In *Crestwood*, the injury that provided standing was simply that John Doe, a resident of the Village of Crestwood, could not enjoy the use of a beer garden for a few hours one afternoon each year. 917 F.2d at 1478. Hardly the kind of injury that would lead to a change in the very pattern of one's life.

Kuhn and Harris at least endure as much of an injury as did the plaintiffs in *St. Charles* and *Crestwood*. If anything, Kuhn and Harris probably suffer an even greater degree of distress due to the fact that the seals of Rolling Meadows and Zion are displayed year-round, throughout the cities, causing these plaintiffs to alter permanently their behavior. *Cf. Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777, 782 (10th Cir. 1985) (Comparing the challenged seal of Bernalillo County to the creche display in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Tenth Circuit noted, "The seal, unlike the creche, pervades the daily lives of county residents; [the creche] is displayed once a year for a brief period on a single parcel of government land. [The seal] appears on all county paper work, on all county vehicles, even on county sheriff's uniforms."). Kuhn and Harris even offer claims of injury that did not exist in *St. Charles*. Kuhn alleges (and the City of Rolling Meadows admits) that he is required to dispose of his refuse in garbage bags that depict the seal. Both Kuhn and Harris allege (and both cities admit) that they are required to display their Cities' tax sticker, which contains the challenged seals, on their car windshields.[8]

[8] The dissent claims that the effect of *Wooley v. Maynard*, 430 U.S. 705 (1977), ought to be addressed. We fail to see how *Wooley*

(Footnote continued on following page)

The dissent also argues that conferring standing on Kuhn and Harris represents a departure from circuit precedent, citing Judge Flaum's opinion in *Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988). We disagree. On the contrary, *Zielke* provides additional support for our analysis and holding in the instant cases. *Zielke* supports the proposition that well-pleaded allegations of palpable injury will satisfy the standing requirement. The reason that the plaintiffs in *Zielke* failed to obtain standing was not due to a "failure of proof." Instead, the *Zielke* plaintiffs failed to satisfy the standing requirement because they were unable to allege any true injury. In *Zielke*, this court declared:

> Provided a litigant alleges the existence of a distinct and palpable injury, even a minor injury can satisfy the case or controversy requirement of Article III . . . . [The plaintiffs] allege that the display [of a monument depicting the Ten Commandments in a public park] is a rebuke to their religious beliefs and that they are offended by its presence; but they admit that they have not altered their behavior as a result of the monument. The psychological harm that results from witnessing conduct with which one disagrees, however, is not sufficient to confer standing on a litigant.

845 F.2d at 1467 (citations omitted). *Zielke* supports conferring standing upon Kuhn and Harris. The *Zielke* plaintiffs never argued that they changed their behavior, as

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[8] *continued*

applies to this case. There are simply no facts in the record to indicate that Kuhn and Harris ever tried to cover up their vehicle tax stickers, or how Rolling Meadows and Zion would react if they attempted to do so. We can only speculate—or we could deny standing because Kuhn and Harris did not cover up or cut out the objectionable part of their stickers and thereby incur criminal liability, as did the plaintiffs in *Wooley*. Either of these approaches is misguided; there are sufficient allegations in the complaints to confer standing on Kuhn and Harris.

Kuhn and Harris have stated in both their complaints and affidavits.

Behind this exposition of the case law "lies the practical recognition that if the injury, tenuous though it be, suffered by the involuntary audience for a display alleged to constitute an establishment of religion does not confer standing to sue, there will be no judicial remedy against establishments of religion that do not depend on public funds." *St. Charles*, 794 F.2d at 268. This "practical recognition" in no way suggests that Kuhn and Harris have not satisfied the legal standards necessary for standing. Instead, this notion only points out that if Kuhn and Harris are not permitted to sue, then there is simply no way to test the constitutionality of the city seals.

B. The Establishment Clause

We turn now to the merits of these appeals. Because there were no material issues in dispute, the district court appropriately resolved these cases on summary judgment. It remains for us to correct the district court's reluctance to apply the full breadth of Establishment Clause freedoms and to reiterate our commitment to an energetic first amendment.

The first amendment provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. It is generally accepted that the framers had two purposes in mind when they drafted the above quoted language: "to prevent the establishment of a national church, and to forbid a national preference of one Christian sect over another." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 123 (7th Cir. 1987) (holding that the placement of a nativity scene in Chicago's City Hall fostered an identification of the City with Christianity, thus violating the Establishment Clause).

Perhaps originally the Religion Clauses merely sought to protect the diversity of faiths and practices within Christianity itself. Thus, Joseph Story could fairly write that

"the real object of the [first] amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government." 2 J. Story, Commentaries on the Constitution of the United States § 1877 at 594 (1851) (quoted in *Wallace v. Jaffree*, 472 U.S. 38, 52 n.36 (1985)). *See also American Jewish Congress*, 827 F.2d at 123-24. But when the principles of religious freedom and tolerance were examined "in the crucible of litigation," the Supreme Court "unambiguously concluded that . . . the first amendment embraces the right to select any religious faith or none at all." *Wallace*, 472 U.S. at 52-53.

In addition to the individual's complete freedom of conscience, "[t]he Religion Clauses also have come to stand for the principle of governmental neutrality, meaning not only that government should not favor one religion over another, but also that government should not favor religion over nonreligion." *American Jewish Congress*, 827 F.2d at 124. With the incorporation of first amendment freedoms into the Due Process Clause of the fourteenth amendment,[9] "[t]he modern Supreme Court has treated the establishment clause as a directive to the courts to strike down all public acts, federal, state, and local, whose primary purpose or predominant effect is to promote one religious group at the expense of others or even promote religion as a whole at the expense of the nonreligious, a position that treats even the nonreligious simply as another sect." *St. Charles*, 794 F.2d at 270.

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[9] *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the fourteenth amendment] embraces the liberties guaranteed by the first amendment. The first amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The fourteenth amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

Needless to say, determining if a given public act promotes a particular religious sect (including, as we have said, the sect of nonbelievers) is no easy task. Yet, in this delicate area of constitutional adjudication, we are reminded that the first amendment does not merely prohibit the establishment of a state church or a state religion; instead, it demands that there should be no law even *respecting* the establishment of religion. A given law or governmental practice might not establish a state religion but nevertheless be one "respecting" such a religion, and hence offend the first amendment. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that the statutory programs of Rhode Island and Pennsylvania that provide state aid to church-related elementary and secondary schools are unconstitutional). At the same time, "it has never been thought possible or even desirable to enforce a regime of total separation between religion and government." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 760 (1973). As a consequence, cases arising under the Religion Clauses of the first amendment have presented some of the most perplexing questions in constitutional law. *Id.* Our task, then, is to assess the seals of Rolling Meadows and Zion in light of these constitutional principles.

To determine if the challenged government conduct does indeed offend the constitution, we rely upon the now familiar three-prong test that was first annunciated in *Lemon v. Kurtzman*, 403 U.S. 602, and recently reconfirmed in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086.[10] If a statute or practice that

[10] The dissent expends considerable effort counting justices and speculating on the future of Establishment Clause jurisprudence in order to suggest that the holding of *County of Allegheny* is "shaky at best." *Infra* at 40. We submit that the fact that *County of Allegheny* was a 5-4 decision, and that one of the members of the majority has since left the court, is not relevant; *County of Allegheny* is still the law of the land, and should be followed by intermediate federal courts of appeals unless and until we are given contrary direction from the Supreme Court.

touches upon religion is to be permissible under the Establishment Clause, then 1) it must have a secular purpose (i.e. its purpose must not be to advance particular religious beliefs); 2) it must neither advance nor inhibit religion in its principal or primary effect; and 3) it must not foster an excessive entanglement with religion. *County of Allegheny*, 109 S. Ct. at 3100; *Lemon*, 403 U.S. at 612-613. The challenged practice or statute—here the corporate seal of Rolling Meadows and the seal, emblem and logo of Zion—must pass each of these tests to be found constitutional.

1. Rolling Meadows

The district court correctly limited the examination of the constitutionality of the Rolling Meadows seal to the second prong of *Lemon*; the seal neither evinces an illegitimate purpose nor fosters any religious entanglement. Thus, the "effects" element forms the critical inquiry of this appeal.

Briefly, as to the first *Lemon* element, it is clear that Cheryl Knudsen, the school girl who essentially designed the seal, acted with no unconstitutional purpose in mind. Knudsen simply drew what she saw as she observed her growing community. And in adopting Knudsen's design in celebration of the City's fifth anniversary, Rolling Meadows did not abandon its fundamental neutrality. *See American Jewish Congress*, 827 F.2d at 126. The City Council adopted the child's entry in order to provide the City with a pleasing design for its seal. There is no evidence to suggest that the city sought to encourage religion in general or Christianity in particular with the adoption and use of the seal. That the City needed an official Rolling Meadows seal to identify city property and correspondence is without question. Thus, the secular purpose element of the *Lemon* analysis is satisfied, as the City's intent in adopting the seal was neither to advance nor inhibit religious practice. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). *See also Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

Similarly, the Rolling Meadows seal creates no entanglement with religion. The fact that the seal happens to depict a church in Ms. Knudsen's neighborhood, the Community Church of Rolling Meadows, does not necessarily entangle the city's business with the mission of the depicted church. There is no evidence in the record to suggest that the Community Church ever intruded into the affairs of the City or that the City ever participated in the policies or operations of the Community Church. Thus, the third prong of the *Lemon* test is also satisfied.

The second, "effects" element of *Lemon*, however, is not so easily met. The aim of the "effects" or endorsement element is to prevent "government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. . . . Whether the word is endorsement, favoritism, or promotion, the essential principle remains the same: the Establishment Clause prevents the government from appearing to take a position on questions of religious belief." *County of Allegheny*, 109 S. Ct. at 3101 (quotation omitted). *See also Edwards*, 482 U.S. at 593 ("Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the first amendment.").

In *County of Allegheny*, the Supreme Court found that a Christmas nativity scene displayed on the Grand Staircase of the Allegheny County Courthouse endorsed a patently Christian message, thus violating the Establishment Clause. By displaying the creche on the most prominent part of the seat of county government, the county sent an unmistakable message that it supported and promoted Christian praise to God. 109 S. Ct. at 3104. In the same way, the obvious presence of a Latin cross on the corporate seal of Rolling Meadows also endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity. It presents to any observer a clear endorsement of all those beliefs associated with a Latin cross in violation of the Establishment Clause of the first amendment.

Like the seat of county government in *County of Allegheny*, or the City Hall Building in *American Jewish Congress*, the corporate seal of a municipality is "plainly under government control . . . (and is) a clear symbol of government power." *American Jewish Congress*, 827 F.2d at 128. In fact, the Rolling Meadows seal presents a more compelling case for finding the challenged display unconstitutional. The City's seal is a permanent statement that is viewed year-round, while the creche is displayed only seasonally amidst the secular celebration of Christmas. The Latin cross on the seal, then, brings together church and state in a manner that suggests their alliance perhaps even more ardently than the unconstitutional creche displays in *County of Allegheny* or *American Jewish Congress*. The seal of Rolling Meadows acts as the City's imprimatur for official correspondence, property and business. The conspicuous depiction of the pre-eminent symbol of a particular faith on that seal conveys a message of approval that is simply inconsistent with the first amendment.

Relying on the presence of other images on the seal, the district court found that "the relation of the challenged image before us, in the context we receive it, to . . . religion, or more specifically Christianity, is weak. . . . The remaining pictures sufficiently neutralize the seal to avoid any religious message a lone or prominent cross would convey." *Kuhn v. Rolling Meadows*, 729 F. Supp. at 1248. Although we agree that the context surrounding the challenged image is crucial,[11] we do not agree that the particular context in this case—the other images on the seal—save the cross on the seal from an unconstitutional endorsement of Christianity. The images on the seal are

[11] *County of Allegheny* makes clear that the constitutionality of a religious display will often depend upon its context. "The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." 109 S. Ct. at 3103.

not just neutral snapshots of the community; they are charged with endorsement. The City tries to hide behind the fact that a young girl essentially designed the seal with no attempt to endorse a particular faith. Yet, regardless of its origins, the Rolling Meadows seal does promote the selected images it depicts. To any observer, the Rolling Meadows seal expresses the City's approval of those four pictures of City life—its flora, its schools, its industry and commercial life, and its Christianity.[12]

It is this last expression of approval—Rolling Meadows' endorsement of Christianity—that simply cannot withstand constitutional scrutiny. The City argues that the cross on the seal invokes Christianity no more than conventional public acknowledgements of religion that continue to pervade American culture, such as the slogan "In God We Trust" on U.S. currency. *See, e.g., Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."). Yet, in the line-drawing process that erects a "blurred, indistinct, and variable barrier" between legitimate invocations of the deity and unconstitutional infringements, we have found that "the more sectarian the display, the closer it is to the original targets of the Establishment Clause, so the more strictly the clause is applied." *St. Charles*, 794 F.2d at 271. *See also Lemon*, 403 U.S. at 614. The Latin cross on the Rolling

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[12] The Supreme Court has determined that, when evaluating the government's use of religious symbolism, the court must consider observers of the symbolism to include both adherents and nonadherents. "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices." *Grand Rapids School District v. Ball*, 473 U.S. 373, 390 (1985). Because the cross in the Rolling Meadows seal endorses Christianity, by implication it also expresses disapproval for divergent religious opinions.

Meadows seal is surely a sectarian display. As such, we hold that it endorses Christianity in violation of the first amendment.

2. Zion

In *Harris v. City of Zion*, the district court found that Zion's seal, emblem and logo violates the "effects" or endorsement element of the *Lemon* test. 729 F. Supp. at 1250. The district court suggested that the Zion seal, emblem and logo might also violate the "purpose" element as well. *Id.* at 1249-50. We agree with the district court's analysis. First, the purpose for the adoption of Zion's unique seal was primarily sectarian. In its adoption of its seal, Zion abandoned fundamental neutrality and acted with the intent to advance a particular religious viewpoint. *See American Jewish Congress*, 827 U.S. at 126 (quoting *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2868 (1952)). Second, the seal, emblem, and logo continue to endorse and promote that sect of Christianity that founded the city and designed the seal in clear violation of the first amendment.[13]

As to the first point, Zion argues that, no matter what the original City Council's purpose in adopting the seal in 1902, the current City Council voted to retain the seal strictly for historical purposes. The City maintains that because the City Council has the authority to modify the seal at any time, the fact that the Council chose to retain the seal for valid reasons provides a new, wholly secular purpose to the seal's adoption. Thus, the City ar-

[13] Because we hold that the Zion seal, emblem and logo violate the second element of the *Lemon* analysis, nothing more is required to demonstrate a violation of the Establishment Clause. *County of Allegheny*, 109 S. Ct. at 3105. Yet, because the history and purpose of the Zion seal is so much a part of this appeal, and because of the inherent delicacy of first amendment adjudication, we discuss the import of the first, "secular purpose" element of *Lemon* as well.

gues, Reverend Dowie's glowing explanation of the seal's religious significance is no longer relevant. The City relies on our statement in *American Jewish Congress* that the original purpose of Chicago's 1959 creche display does not form the purpose of a similar display in 1985. *See American Jewish Congress*, 827 F.2d at 126 (quoting Mayor Daley's 1959 comment on the Chicago nativity scene,[14] and concluding that, "although perhaps relevant to the original purpose of the nativity scene, [Mayor Daley's comment] reveals little about the purpose behind the 1985-86 display.").

The district court distinguished Zion's seal from the Chicago nativity scene by noting that the creche must be erected and dismantled each Christmas season, a practice that requires a new purpose every year. The Zion seal, on the other hand, was adopted by one legislative decision on May 6, 1902, and has remained essentially unaltered. Nevertheless, the City points to a May 20, 1986 resolution in which the Council voted to retain the seal for historical reasons. The 1986 resolution, the City argues, is the true expression of purpose for the Zion seal. We are not persuaded. "While the court is normally deferential to a state's [or municipality's] articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 586-87. *See also Wallace*, 472 U.S. at 64 (Powell, J., concurring); *id.* at 75 (O'Connor, J., concurring in judgment). The minutes from the May 20, 1986 Council meeting offer, at best, meager evidence to demonstrate that the decision to retain the current seal was prompted by a desire to honor Zion's history. With such explicit religious design behind the seal's original adoption in 1902, something more than a perfunctory appeal to history is

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[14] Mayor Daley (the First) said of the nativity scene: "We are a Christian nation. I think the more religion we can get in politics, the better off we are." *American Jewish Congress*, 827 F.2d at 126.

required to legitimatize the underlying purpose of this particular seal.

Even if we accept the 1986 resolution as an "historical" revision of purpose, the Zion symbols constitute an unconstitutional endorsement of Christianity, specifically, the Christian Catholic sect that still flourishes in Zion. The Zion seal presents the quintessential violation of the "longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs." *County of Allegheny*, 109 S. Ct. at 3115. The City argues that the symbols in the seal—the shield, the sword or scepter, and the dove—do not convey a religious message. The City maintains that to the average resident who is not aware of Zion's history, the shield connotes achievement, the sword or scepter represents power or authority, and the dove suggests peace. The City concedes, however, that the Latin cross is singularly religious.

We are not convinced. It may be true that each symbol (with the exception of the cross), if taken individually, possesses several meanings, some religious and some secular. But when all the symbols, including the cross, are depicted in a single design under a flowing ribbon which reads "God Reigns," there is no question that the message conveyed is not only religious, but also sectarian.[15]

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[15] Again, we note that, when examining Zion's use of Christian symbolism in its corporate seal, we must consider the likely perceptions of both adherents and nonadherents of the challenged religious imagery. *See supra* at note 12. With this broad, objective standard, the court must evaluate the *overall* impact of the seal, emblem and logo. *See Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777, 781 (10th Cir. 1985) ("The existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or the average observer of the government action."). Thus, as the district court found on Zion's motion for reconsideration, the fact that the City's mayor does not believe that the seal conveys a religious message or that the 1600 residents who signed a petition do not feel that the seal

(Footnote continued on following page)

The cross, shield, sword, scepter, dove, and crown are perhaps the most dominant and recurring images of Christianity. Depicting these patently religious symbols on a corporate seal that is wholly owned and controlled by the City connotes the City's approval for the message conveyed. *See American Jewish Congress*, 827 F.2d at 128 ("Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval.") With its Christian imagery, therefore, Zion's corporate seal, emblem, and logo inevitably create an unmistakable impression that the local government tacitly endorses Christianity.

Perhaps Zion's strongest argument lies in its claim that its seal, emblem and logo merely commemorate the historical origins of the City and, thus, convey no unconstitutional endorsement. The seal does not advance religion, Zion maintains, but only celebrates the City's roots. This argument is buttressed by the fact that the City of Zion can indeed boast a unique history, which this court respects. This religious heritage may deserve commemoration. Nevertheless, the City may not honor its history by retaining the blatantly sectarian seal, emblem, and logo. These symbols transcend mere commemoration, and effectively endorse or promote the Christian faith.

In *Friedman*, the only other case on record that involves a seal containing a Latin cross, the Tenth Circuit held that the county's seal violated the Establishment Clause because its depiction of a golden cross under the Spanish motto, "CON ESTA VENCEMOS" ("With This We Conquer"), clearly endorsed Christianity as its principal or primary effect. The Tenth Circuit enjoined the county's use of the challenged seal even though the reli-

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[15] *continued*

denotes discrimination is barely relevant, and clearly non-probative. The key issue in this case is not the mayor's views or even discrimination. The question to be resolved solely involves the primary purpose and predominant effect of Zion's seal, emblem and logo. We find that purpose and effect to violate the first amendment.

gious imagery in the seal was said to commemorate the role of the Catholic Church in the settlement of the Southwest. *See* 781 F.2d at 779. The City of Zion seeks to distinguish its corporate seal from the seal of Bernalillo County by noting that the Latin cross in the Zion seal is smaller and shares space on the seal with a crown, a scepter and a dove. We find this argument a baseless attempt at distinction. Instead, we choose to follow the fundamental reasoning of the Tenth Circuit: "If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so." *Id.* at 781.

Zion's seal, emblem, and logo do indeed endorse Christianity. As the district court found, nothing within the four corners of Zion's seal, emblem or logo detracts from their sectarian message. No appeal to history can abate that message when the images in the seal are abstract symbols of a particular Christian sect. The Establishment Clause, at the very least, "prohibits government from appearing to take a position on questions of religious belief." *County of Allegheny*, 109 S. Ct. at 3101. The resulting endorsement of religion need not be material or tangible; an implicit symbolic benefit is enough. *Friedman*, 781 F.2d at 781 (construing *Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982)). Thus, Zion's use of its current seal, emblem, and logo must be discontinued due to their unconstitutional endorsement of Christianity.

III. Conclusion

We hold that the corporate seal of the City of Rolling Meadows and the seal, emblem and logo of the City of Zion represent unconstitutional endorsements of a particular religious faith. Accordingly, we affirm the district court's judgment in *Harris v. Zion*, and reverse in *Kuhn v. City of Rolling Meadows*. Thus, both cities are permanently enjoined from continued use of their seals (and in Zion's case, its emblem and logo as well) in their present unconstitutional forms.

Nos. 90-1542 & 90-1673

APPENDIX A

Nos. 90-1542 & 90-1673

APPENDIX B

Nos. 90-1542 & 90-1673

APPENDIX C

Nos. 90-1542 & 90-1673

APPENDIX D

Nos. 90-1542 & 90-1673

EASTERBROOK, *Circuit Judge*, dissenting. Applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to religious symbols on city seals is no cakewalk. *Lemon*'s "three-part test" is not a test. It is a triad of questions, the answers to which conflict in all interesting cases. Conflict is what makes a case worth litigating. How to resolve conflicts? It is easy to list things to inquire about and hard to establish weights that produce outcomes congruent with the Constitution. *Lemon* does the former but not the latter. You need an understanding of the religion clauses, not a list of factors, to resolve tough cases such as ours. Before giving a constitutional opinion, however, we should be sure that there is a case or controversy. I have my doubts, and it is on this ground that the majority and I part company.

I

Plaintiffs say that they must go out of their way to avoid seeing religious symbols. This sort of allegation we deemed sufficient in *ACLU v. City of St. Charles*, 794 F.2d 265, 267-69 (7th Cir. 1986), and *Doe v. Village of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990). Standing sometimes depends on an "identifiable trifle". Claims about detours are about as trifling as one can produce. They sidle up against the line drawn by *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982), which holds that offense taken at the government's complicity in religion does not create standing. Cf. *Allen v. Wright*, 468 U.S. 737 (1984). If offense is not enough, why is a detour attributable to that offense enough? The answer cannot be, as my colleagues say, that the willingness to take a detour "validates the existence of genuine distress" (majority op. at 9); *Valley Forge* tells us that dismay does not establish standing, and therefore new and better ways to prove its existence cannot create standing. *St. Charles* holds instead that the detour narrows the class of plaintiffs and scope of dispute. If that is its function then we must ensure, when the plaintiffs' claims are challenged,

that they have changed their daily constitutionals, that we are indeed dealing with injured rather than ideological plaintiffs. Both cities contested the plaintiffs' claims, yet the district court decided the cases without resolving these disputes.

My colleagues say that in determining standing to sue the allegations of the complaint must be taken as gospel. Some language in *St. Charles* looks in this direction, distinguishing the allegations needed to establish standing from the proof needed to prevail, 794 F.2d at 269, but the defendants there conceded the plaintiff's detour. These cities do not concede that the plaintiffs have rearranged their daily routines to avoid exposure to religious symbols. Quite the contrary, Zion contends that Harris moved in precisely because of the imagery in its seal. Harris related during his deposition that he had been recruited by the Society of Separationists as a potential plaintiff (apparently none of the existing residents of the city objected to the seal). He moved to a boarding house within the city's limits and lent his name to the litigation. This looks like a put-up job, distinct from the claim in *St. Charles* and *Crestwood* that long-time residents had been compelled by religious scruples to change the patterns of their lives. Harris has not incurred a "tangible, albeit small cost that validates the existence of genuine distress" (majority op. at 9); he has incurred a tangible cost to expose himself to the seal. For Harris the seal is an attractive nuisance, not an irritant compelling changes of the sort we discussed in *St. Charles* and *Crestwood*. At the end of the day, what matters is that *St. Charles* recognized that the plaintiff could not *prevail* without proving the "detour" allegations of the complaint. 794 F.2d at 269. Today's opinion dispenses with that requirement.

Ought we render constitutional judgment on the theory that federal courts are bound to accept whatever the scrivener put in the complaint? Then parties could confer jurisdiction on a court by consent, and collusive litigation would burgeon. Impositions on federal courts could

flourish: one citizen of Illinois could sue another under the diversity jurisdiction by alleging that he is a citizen of Indiana, and despite the defendant's protests the court would not examine the veracity of the allegation. Yet courts *do* examine the jurisdictional allegations of complaints—that is what 28 U.S.C. §1359 and Fed. R. Civ. P. 12(b)(1), among other tools, are for.

Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990), furnishes an example. The D.C. Circuit allowed an inference of standing from the general allegations of the complaint, despite a challenge by the defendants and an inability of the plaintiffs to substantiate their allegations with proof. The Supreme Court reversed, holding that plaintiffs must do more than allege; in response to a motion for summary judgment, they must produce affidavits showing the essential kind of injury. So it should be in our cases. So it has been in the past in this circuit. Plaintiffs in *Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), contended that a monument displaying the Ten Commandments violated the establishment clause. Most of the plaintiffs said that they took offense; we deemed this insufficient under *Valley Forge*. One of their number, Phyllis Grams, alleged that she lived nearby. This, too, we held insufficient:

> Although Grams lives in the City of La Crosse, the appellants did not demonstrate that she lives anywhere near Cameron Park, that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park. The appellants also failed to establish that Grams suffered any injury simply because of her close proximity to the . . . allegedly unconstitutional display. We therefore conclude that Grams cannot establish Article III standing simply on the basis of her alleged but unproven proximity to the offending conduct.

845 F.2d at 1469. If Phyllis Grams had to prove her claims when challenged, why not Clint Harris and Theodore Kuhn? See also *O'Hair v. White*, 675 F.2d 680, 696 & n.35 (5th

Cir. 1982) (in banc) (plaintiff must prove the factual allegations used to establish standing); *Citizens Concerned for Separation of Church and State v. Denver*, 628 F.2d 1289, 1298 (10th Cir. 1980). A requirement of proof is essential to avoid unnecessary constitutional adjudication, and I do not see why we should go out of our way (take a detour?) to undermine that safeguard.

Doubtless there is a sense in which failure of proof does not abolish standing. A plaintiff suing a driver who, he says, ran him down in the street, loses outright if the evidence shows that the injury was suffered falling down stairs at home; we do not retroactively dismiss for want of standing. It is easy to marshal cases for this proposition; the majority does so, citing not only *St. Charles* but also *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027, 1034 (7th Cir. 1982). Little beyond nomenclature is at stake, because both of these cases recognize that the plaintiff must prove the allegations in order to prevail, just as *Lujan* held. See also *Crawford v. United States*, 796 F.2d 924, 928-29 (7th Cir. 1986).

Failure of proof is not the only problem. I doubt that the allegations establish standing even if they can be proved. The cities put their seals on vehicle stickers, garbage bags, public buildings and cars, and public documents. Plaintiffs object to all of these, but most of these uses do not lead to an alteration in conduct. Harris's complaint, for example, protests the appearance of the seal on mail Zion sends him. But he does not allege that these symbols lead him to alter his conduct in any fashion. So too with the seal on the stickers that demonstrate payment of the vehicle tax: Harris contends that he avoids looking at the sticker, but this is hardly a detrimental alteration in conduct; drivers are supposed to look at the road ahead of them, not at tax stickers. Even this tiny inconvenience could be eliminated. Someone with a simple self-help remedy for his problem suffers no "injury in fact" and is not entitled to a judicial remedy that adversely affects the interests of his neighbors who may like

the seals. Plaintiffs have such a remedy. *Wooley v. Maynard*, 430 U.S. 705 (1977), allows plaintiffs to cut out or cover up the objectionable portions of the seals. Drivers may not be conscripted as billboards for ideas of which they disapprove. So too with the imprinting of seals on the garbage bags Rolling Meadows supplies. If it tried to stop Kuhn from using bags without seals he would have standing—but only to claim his right under *Wooley* to edit the bags. For all we can tell, the city has no objection to redaction. Counsel for Kuhn said at oral argument that Rolling Meadows does not pick up garbage from bags that do not bear the seal. But the record does not reveal whether this is because of the absence of the seal or because the substitute bags were the wrong size or material. Silence on questions of this nature is not a firm basis for reaching a difficult constitutional question. At all events, our plaintiffs lack standing to stop *other* persons from having or using the seals. Could Maynard have obtained an injunction blocking New Hampshire from putting "Live Free or Die" on *any* license plates? I doubt it.

The public seals (e.g., on the water tower in Zion) give the best case for standing, because residents then may say: "I take a longer route to avoid viewing that seal." There are two problems. First, despite what the majority says, Kuhn does *not* allege that he goes out of his way to avoid public displays of the seal. His affidavit omits any such assertion, contending instead that he is embarrassed by the seal, and that he does not enter public buildings where it appears. (Would he have used these buildings in the absence of the seal?) Second, allegations of this kind, if proven, challenge only the *display* of the seal in a particular place, not its composition. *St. Charles* allowed the plaintiff to object to a particular, visible cross; we did not say that because the city erected a 35-foot, lighted cross in public, the plaintiff could obtain an order forbidding, say, a crucifix on the mayor's desk. The constitutional injury could be eliminated by taking down the cross; here any injury could be eliminated by removing the seals from the water tower and other public places.

Knowing that someone, somewhere, is using a seal with a cross yields purely abstract injury, a demand that the first amendment be enforced for its own sake. Under *Valley Forge* neither Harris nor Kuhn has standing to challenge internal use, any more than they would have standing to challenge an icon in the mayor's office, or a crèche being stored in the basement of city hall. Even if they had standing, they could not prevail on the merits. *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986). Perhaps one could say that they have "standing" once they come across a single seal but that the relief should be limited to getting the seals out of the public eye, but this would be a detail. What matters is that they have asked for—and the majority gives them—relief more extensive than that necessary to eliminate *their* injuries. Call it standing, call it redressability, call it (following *Roy*) the limited scope of permissible relief on the merits, the point is the same. They have at most an entitlement to the obliteration of the symbols that cause detours; any more extensive relief is unwarranted. We should dismiss the complaints to the extent they challenge anything other than placements that lead to inconvenient detours, and remand the residue with instructions to put plaintiffs to their proof.

My colleagues' unwillingness to do this stems in part from their belief that if the plaintiffs lack standing, then "there is simply no way to test the constitutionality of the city seals" (majority op. at 17). This misunderstands two things: my position, and the Constitution. I do not say that the plaintiffs lack standing utterly; I contend, rather, that the district court should determine whether the plaintiffs' factual assertions are true. If these plaintiffs cannot prove their allegations, perhaps some other residents of Zion and Rolling Meadows could. One who says that he was run down by a truck must prove it, and the demand for proof no more obliterates tort litigation than my position would wipe out establishment clause litigation. But if it did, so what? Article III of the Constitution limits judicial power to cases and controversies. If because no one is injured there is no controversy, then

the Constitution demands that the court dismiss the suit. There is no exception for subjects that as a result cannot be raised at all. " 'The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.' *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. [208,] 227 [(1984)]. This view would convert standing into a requirement that must be observed only when satisfied." *Valley Forge*, 454 U.S. at 489. Constitutional decisions may be necessary in the course of deciding real cases. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Courts do not create cases so that they will have the opportunity to render constitutional decisions. Adjudication is a byproduct of a real controversy, and not the other way around. If there is no case, then there is no occasion for deciding a constitutional question, and we should not mourn or struggle against this allocation of governmental powers. *Hewitt v. Helms*, 482 U.S. 755, 761-62 (1987); *Alliance to End Repression v. Chicago*, 820 F.2d 873, 876 (1987).

II

I comment briefly on the merits because we may not be the final decision-makers.

The establishment clause of the first amendment, as I understand it, forbids taxation and coercion in support of religion but does not forbid the display of religious symbols. *Allegheny County v. ACLU*, 109 S. Ct. 3086, 3134-46 (1989) (Kennedy, J., dissenting); *American Jewish Congress v. Chicago*, 827 F.2d 120, 128-40 (7th Cir. 1987) (Easterbrook, J., dissenting). I omit the line of argument that produces this conclusion and refer readers to my earlier opinion and Justice Kennedy's (which Chief Justice Rehnquist and Justices White and Scalia joined). Religious imagery on city seals does not raise taxes (seals with crosses are no more costly to produce than seals using other symbols) or penalize non-observance. The Constitution distinguishes threats from shadows. Zion's seal has been in use for 89 years without stifling religious diversity or slow-

ing the conversion of a religious enclave to a secular city. Not one resident of Zion other than Harris has expressed concern. Instead of driving non-believers away, the seal attracted Harris to it.

Perhaps a seal *could* penalize non-belief by striking fear into the hearts of viewers. See *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (in banc). "Con esta vencemos", Bernalillo County's slogan, was one the Jesuits used when burning heretics. When the police cars bearing it toured a predominantly Indian population, which had been mistreated by the Christians, there was reason to fear that the "Christian police" were at hand, perhaps with the Grand Inquisitor in tow. 781 F.2d at 779. Zion's seal carries no such message to an objective (or any other) observer, and Rolling Meadows' is pallid.

Justice Kennedy's views did not prevail in *Allegheny*. Three justices (Brennan, Marshall, & Stevens, JJ.) took a strict separatist position, and two (Blackmun & O'Connor, JJ.) reached the conclusion that a local government may use religious symbols if it does not "endorse" religion. 109 S. Ct. at 3100-01. That two-justice position, the most narrow offered in support of the judgment, is the "holding" of *Allegheny*. *Marks v. United States*, 430 U.S. 188, 193 (1977). Any legal position rejected by seven justices is shaky at best, and we cannot be confident that it will survive. Stability has not been a notable feature of establishment clause jurisprudence. No one should be surprised if the view held by four justices, one with deeper historical roots, see *AJC*, 827 F.2d at 135-37, eventually obtains a majority.

Applying the two-justice "no endorsement" view to city seals produces nothing but headaches. What *is* endorsement in a world pervaded by religious imagery, from the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity) to "In God We Trust" on the coinage to Thanksgiving Day (to Whom are thanks being given?) to the religious stamps

the Postal Service issues at Christmas and Easter to the names of our cities (Los Angeles, San Francisco, Corpus Christi) and submarines (the same list; there is even a "Los Angeles class" of submarines)? See *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979). Did the United States endorse a particular religion when putting "Corpus Christi" on a submarine? But perhaps the name's significance has been forgotten, or is overlooked in daily use. Why not say the same about the imagery on seals?

Does the city "endorse" everything on its seals? The majority answers yes and on this ground gives judgment for the plaintiffs. But Justices Blackmun and O'Connor did not cleave to such a view. *Allegheny* involved religious symbols on public property. The justices could have said that a city necessarily endorses whatever appears in its halls. Had they done this, the Court would have held unconstitutional the placement of a huge menorah in front of Pittsburgh's city hall. Yet the Court sustained the placement, because a nearby Christmas tree withdrew any implication that the city endorsed Judaism. Should one not say the same thing for at least the Rolling Meadows seal, in which the cross is surrounded by secular symbols, including a leaf, a school, and a water tower? The majority's riposte—whatever the city prints, it endorses—is inconsistent with the views of six justices in *Allegheny*.

Cases such as ours show some of *Lemon*'s problems. The majority immediately throws away one "prong" of its test for both cases, and a second tine ("purpose") sloughs off for Rolling Meadows. Everything collapses to the no-endorsement rule, one more compelling if divorced from the three-part test (or as advanced thinkers call it these days, "tri-partite inquiry"). Why use three parts when only one matters?

A majority of the Court has reached this conclusion, making our reference to *Lemon* cutdated. The four dissenting justices in *Allegheny* withheld support, 109 S. Ct. at 3134, and Justice O'Connor, who provided the essential fifth vote for the majority, did so without relying on

Lemon, a case of which she has been critical. *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting). Thus only four justices relied on *Lemon* in *Allegheny*. *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court's other recent case dealing with religious symbols, also bypasses the *Lemon* "tests". We should take this cue and do likewise.

To see why *Lemon* has lost its tang one need look no further that the majority's application of its purpose prong. My colleagues say that Zion's seal violates the first amendment because it was designed by Rev. Dowie and adopted by the city council in 1902 to carry out the religious mission of the Christian Catholic Church. Indeed so; Zion was founded as a religious utopian community, and the Theocratic Party governed for more than two generations. In 1902 no one would have given this a second thought: the speech clause of the first amendment was not applied to the states until *Gitlow v. New York*, 268 U.S. 652 (1925), and the religion clauses were not extended to the states for another 27 years. *Zorach v. Clauson*, 343 U.S. 306 (1952). Given our commitment to cultural and religious diversity, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the establishment of religious communities is unexceptionable. Many of this Nation's founders sought to establish religiously identifiable communities, and their value has been shown recently by the Mormons, who needed separate communities to survive hostility to their beliefs, and by the Amish, whose way of life is tightly integrated with their religious beliefs. The purpose behind Zion's creation—of which its seal is only an incidental part—does not count against it.

Why should a purpose to promote religion ever condemn an act of government? Often it does not: all of the accommodation-of-religion cases flunk this purpose inquiry, yet many accommodation rules are sustained and, when doing this, the Court ignores *Lemon*. Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1. Other laws have religious purposes (e.g., the Sunday closing laws) but are sustained because they *also* have secular purposes.

Suppose Zion originally built schools because Rev. Dowie said they made for better missionaries. Would the schools in Zion have to be torn down? Fra Angelica painted to glorify the Roman Catholic Church; do we doubt that the display of his paintings in the National Gallery has a secular purpose? Why would the purpose of maintaining the seal in Zion be different? If there is something wrong with the seal, how about the city's name? This, too, was picked for a religious purpose and conveys a religious message—more potent than the seal. Must the city change its name?

The majority allows that a genuine change of heart can cleanse the improper motive. Yet why has not Zion had a change of heart? Are we looking into the heads of the members of the city council who voted in 1986 to retain the seal for (they assert) historical reasons? The Theocratic Party lost power in Zion more than 40 years ago and is defunct. So far as the record shows, not one member of Zion's city council belongs to the Christian Catholic Church or owes office to constituents who support that faith. Before declaring that the current purpose of the seal is religious, we would need a trial that has not yet occurred. Zion can't lose a motive question on an empty record. (There were fat records in *Edwards v. Aguillard*, 482 U.S. 578 (1987), and *Wallace v. Jaffree*, 472 U.S. 38 (1985).)

So we should bypass *Lemon* as Justice O'Connor did in *Allegheny* and ask her question directly: would an objective observer view these seals as endorsements of Christianity? Whether the observer would have this reaction gives me more trouble than it does the majority. The imagery in Zion's seal is overwhelming, but the historical context may prevent an *informed* observer from inferring contemporary endorsement. As for Rolling Meadows: its seal is not powerfully Christian. The object of everyone's attention looks more like a telephone pole than a cross; its arms are too short to crucify anyone. The original plaintiff dropped out because he came to conclude that the symbol *is* a utility pole in front of an industrial build-

ing. We know, from the affidavit of the artist, that it was meant to be a cross, but an objective observer lacks this knowledge. I do not think we can say, as the majority does (op. at 4), that it is "no doubt" a cross. It is "obviously" a cross only after you know the genesis of the seal, which is to say that to the outside observer it is *not* obviously a cross. It is enough, however, that Rolling Meadows concedes that an observer would take this as a cross, and we ought to accept the concession rather than treat the debatable as obvious.

How, then, are we to carry out the tasks set for us by Justices Blackmun and O'Connor? There is no straightforward way—perhaps no way, period—to do so. Which may indicate that we have been sent on a wild goose chase, that the proper answer lies along the path of the separatists (Justices Brennan, Marshall, and Stevens) or along the path marked by Justice Kennedy. The best I can do is to predict that Justices Blackmun and O'Connor would condemn the use of any religious imagery not nestled in a secular context. What kind of context? We discussed the subject in *Crestwood*, 917 F.2d at 1478-79:

> Two contexts mattered—first the season, for in each case [*Allegheny* and its predecessor *Lynch*] the government was displaying the symbols appropriate to the time of year; second the immediately surrounding symbols, for in each case the government was displaying an assortment of symbols appropriate to all aspects of the holidays. Christmas and Hanukkah are secular as well as religious holidays; to use symbols appropriate to all aspects of the occasion is not to endorse a particular religion. *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989). If Christmas may be a secular holiday, the state may recognize whose birthday is being commemorated.

Zion's symbols do not have a secular context of any sort. Rolling Meadows is not trying to put the cross in a seasonal context and is not displaying all of the symbols for an occasion. It selected a few, which are unrelated ex-

cept by being within the borders of the city. Governance is not a "context" that drains the significance of a religious image.

So long as the two-justice position in *Allegheny* rules, we must condemn these seals (if we reach the merits). This approach avoids the need to apply judicial aesthetic judgment, or perhaps recur to the gestalt psychologists. I don't know how to determine what observers think, *if* they think at all about these seals. Line drawing in this area will be erratic and heavily influenced by the personal views of the judges. We ought to use bright line rules, and *Allegheny* (while it lasts) admits of this one.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—3-19-91—500

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 10, 1991

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 90-1542

CLINT W. HARRIS and
THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellees,

v.

CITY OF ZION, LAKE COUNTY, ILLINOIS,
MAYOR OF ZION and ZION CITY COUNCIL,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 7204—**James B. Zagel**, *Judge.*

(Caption continued on following page)

Nos. 90-1542 & 90-1673

No. 90-1673

THEODORE M. KUHN and
THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellants,

v.

CITY OF ROLLING MEADOWS, MAYOR OF ROLLING MEADOWS and THE ROLLING MEADOWS CITY COUNCIL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 7205—**James B. Zagel**, *Judge.*

ORDER

Defendants-Appellants, the City of Zion, the Mayor of Zion and the Zion City Council, and Defendants-Appellees, the City of Rolling Meadows, the Mayor of Rolling Meadows and the Rolling Meadows City Council, filed petitions for rehearing and suggestions of rehearing in banc on April 2, 1991. All members of the panel voted to deny the petitions for rehearing. A vote of the active members of the court was requested, and a majority of the active judges have voted to deny a rehearing in banc. Circuit Judges Cudahy, Posner, Coffey, Manion and Kanne voted to grant rehearing in banc. The petitions for rehearing are therefore DENIED.

Nos. 90-1542 & 90-1673

EASTERBROOK, *Circuit Judge*, concurring in the denial of rehearing in banc. My vote against rehearing does not reflect second thoughts about the position stated in my dissenting opinion or doubt about the importance of the issues. I believe, instead, that the case should proceed without further delay to the Court that can resolve the issues the panel addressed. Cf. *Lee v. Weisman*, 111 S. Ct. 1305 (1991), granting cert. to review 908 F.2d 1090 (1st Cir. 1990).

CUDAHY, *Circuit Judge*, with whom MANION, *Circuit Judge*, joins, dissenting from denial of rehearing *en banc*.

Whatever else may be said about the panel opinion (*Harris v. City of Zion*, No. 90-1542; *Kuhn v. City of Rolling Meadows*, No. 90-1673, slip op. (7th Cir. Mar. 19, 1991)), its potential impact is sweeping. The rationale that any religious reference ("endorsement" is a misnomer) in a municipality's mark or name is constitutionally suspect apparently puts in jeopardy the names of famous cities across the land. St. Louis, Santa Fe, Los Angeles—even places like Devil's Head and Hell's Canyon (diabolism?)—come to mind, not to mention Zion itself. The resonantly Biblical name "Zion" for a city, under the present logic, advances and endorses Judaism or Christianity or both.

I think that the district court had it right in *Rolling Meadows*. Assuming that the diminutive symbol in question is a Roman cross—it might be a telephone pole—any message of endorsement is either non-existent or *de minimis*. There is little evidence of meaningful offense from the fancied religious implications of this ambiguous design—created by a schoolchild. The plaintiffs' injury is elusive, and I share Judge Easterbrook's doubt whether it is the sort of harm that rises to a "case or controversy" or the type of injury crying out for constitutional redress. *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-87

(1982) (simple offense at perceived constitutional violation not enough to provide standing).

The Zion seal has been part of that city's nearly 100-year history, and has always been so regarded (with affection and pride) until the plaintiff's claim of harm implausibly conjured up the First Amendment. Again, the claim of injury seems not only too far-fetched to win "case or controversy" status but actually appears manufactured for purposes of litigation only. In any event the Zion seal merely reflects an historical fact—that the city was founded, named and emblematized as an act of protestant evangelism. It is not the function of the courts to cause the historical facts to vanish—even through a whiff of the First Amendment.

If the seal of Salt Lake City were to show Brigham Young emerging from the mountains toward the valley of the Great Salt Lake with the Book of Mormon (or even the golden plates of Joseph Smith) tucked under his arm, anyone with a common sense of history would see this as reflecting a dramatic event in American history—hardly as an endorsement of a religion. In fact, there were excellent reasons why the Mormons might have named their Utah destination "Zion"[1]—thereby catching themselves in the constitutional snares of the present doctrine.

This analysis appears to meet the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In *Rolling Meadows* only the "effects" prong is arguably implicated and it seems to me that the seal gives rise to no effects of consequence. In *Zion* both the "effects" and the "purpose" prongs are met by the historical setting of the seal. Any religious purpose resides far in the past while the current purpose is purely commemorative, and the present effects of the seal are only to call a unique history to mind.

The history of the city of Zion (Illinois) cannot be erased or obliterated. The city has stood for almost a hundred

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[1] *Cf.* Zion National Park in southwestern Utah.

years as a memento of Christian evangelism. To destroy the seal, which contemporaneously reflected the founding of the city, is to demean an important value in the name of a threat which simply isn't there. It is significant that the Zion city council, containing *no members* of the "Christian Catholic" sect and presumably therefore victims rather than beneficiaries of the seal's imagined religious implications, voted with enthusiasm to keep it as their historical heritage.

The "wall of separation" between church and state is not in question, but we need not sprinkle broken glass and string barbed wire on top. This important opinion needs careful reconsideration by the whole court and/or the United States Supreme Court.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—6-10-91—500

Clint W. HARRIS, et al.,

Plaintiffs,

v.

CITY OF ZION, et al.,

Defendants.

Theodore M. KUHN,

Plaintiffs,

v.

CITY OF ROLLING MEADOWS, et al.,

Defendants.

Nos. 87 C 7204, 87 C 7205.

United States District Court,
N.D. Illinois E.D.

Feb. 9, 1990

Residents of two cities and a separationist organization brought action against the two cities for declaratory and injunctive relief, seeking to enjoin further display of religious symbols on the cities' corporate seals. Plaintiffs moved for summary judgment. The District Court, Zagel, J., held that: (1) the first city's seal's principal or primary effect was not one that advanced religion, and (2) the second city's seal's emblem and logo had the effect of endorsing a Christian message.

Granted in part, and denied in part.

1. Constitutional Law

Presence of cross on city's corporate seal did not have principal or primary effect of advancing religion, and thus, did not violate First Amendment's establishment clause; cross was only one of several pictures that comprised display on seal, and remaining pictures sufficiently "neutralized" seal to avoid any religious message lone or a prominent cross would convey. U.S.C.A Const.Amend. 1.

2. Constitutional Law

Presence of cross and dove of peace along with words "God Reigns" on city's seal were intended by city's legislature to identify city with Christian Catholic Church and impart symbolically the values of that church; thus, seal violated First Amendment's establishment clause. U.S.C.A. Const.Amend. 1.

Richard M. Gutman, Chicago, Ill., for plaintiffs.

Roderick A. Palmore, Jane A. Zimmerman, Paul S. Chervin, Wildman, Harrold Allen & Dixon, Chicago, Ill., Berle L. Schwartz, Highland Park, Ill., Adeline Jay Geo-Karis, Zion, for City of Zion, et al.

Donald Rose, Cathleen Ross, Rose & Ross, Ltd., Rolling Meadows, Ill., for City of Rolling Meadows, et al.

MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

I. INTRODUCTION

The plaintiffs in *Kuhn v. City of Rolling Meadows* and the plaintiffs in *Harris v. City of Zion* bring actions under 42 U.S.C sec. 1983, seeking declaratory and injunctive relief. The plaintiffs in *Kuhn* have moved for summary judgment pursuant to Fed.R.Civ.P. 56. The plaintiffs and the defendants in *Harris* have both moved for summary judgment under Fed.R.Civ.P. 56. A summary judgment motion under Rule 56 imposes on the movant the burden of establishing the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Because there are no material factual issues in dispute in either case, summary judgment is appropriate for the resolution of this litigation.

The two cases before the Court present the same legal issue: the constitutionality of a religious symbol in a municipality's corporate seal. Our judgment is this: In *Kuhn v. City of Rolling Meadows* we deny the plaintiffs' motion. We hold that the official seal of the City of Rolling Meadows does not violate the First Amendment of the United States Constitution. However, because the defendant in *Kuhn* has not moved for summary judgment,

we take no further step than to deny the plaintiffs' motion for summary judgment. In *Harris v. City of Zion* we deny the defendants' motion and grant the plaintiffs' motion. We hold that the seal, emblem, and logo of the City of Zion violate the First Amendment of the United States Constitution, and therefore enjoin the City of Zion from their continued use.

II. FACTS

A. The City of Rolling Meadows

The plaintiffs are Theodore M. Kuhn, a resident of the City of Rolling Meadows, and the Society of Separationists, Inc., a Maryland corporation. The defendants are the City of Rolling Meadows, Cook County, Illinois ("Rolling Meadows"), the Mayor of Rolling Meadows, and the City Council of Rolling Meadows. The plaintiffs sue the individual members of the City Council, which includes the Mayor, in their official capacities.

Rolling Meadows' corporate seal (Exhibit A) appears below:

Exhibit A

This seal appears on all city-owned vehicles, including all police cars and some fire trucks, on the city vehicle stickers of all vehicles operated by city residents, on the shoulder patch of the city police officers, on the city letterhead, and in the City Council chambers.

Rolling Meadows adopted the seal in 1960, the year Rolling Meadows celebrated its fifth anniversary. An eighth grader, Cheryl Knudsen, designed the seal in response to a school art assignment. In an affidavit, Knudsen described the inspiration

for her design: "I drew what I saw, [and] had no purpose other than to complete an assignment." An independent committee selected, and the City Council approved the adoption of, Knudsen's design.

B. The City of Zion

The plaintiffs are Clint W. Harris, a resident of the City of Zion, and the Society of Separationists, Inc. The defendants are the City of Zion, Lake County, Illinois ("Zion"), the Mayor of Zion, and the Zion City Council. The plaintiffs sue the individual members of the City Council, which includes the Mayor, in their official capacities.

Zion's corporate seal (Exhibit B), which contains the Zion emblem, and Zion's logo (Exhibit C) appear below:

Exhibit B

Exhibit C

The emblem is found in the seal and is surrounded by the phrases "CORPORATE SEAL" and "CITY OF ZION, ILLINOIS."

The seal or logo appears on the city flag, on the city letterhead, in the City Council chambers, on the city vehicle stickers of all vehicles operated by city residents, on the shoulder patch of the city police officers and fire fighters, on the city's water tower located near Ninth Street in Zion, on all city street signs, and on all city-owned vehicles.

At the first meeting of the Zion City Council on May 6, 1902, the Reverend John Alexander Dowie, "the Overseer of the Christian Catholic Church in Zion," presented the City Council with a proposed City of Zion corporate seal. The Christian Catholic Church of Zion was and is an Evangelical Protestant church founded by Dowie. The City of Zion was also founded by Dowie "for the purpose of the extension of the Kingdom of God upon earth . . . where God shall rule in every department of family, industry, commercial, educational, ecclesiastical and political life." The City Council's Minutes are clear, in the words of Dowie, on the purpose of the seal:

> In presenting to you this seal, I ask you to accept it and to use it reverently. Let no hand ever hold this lever and put this seal to anything that God does not approve.
>
> Let the officer who uses this seal feel, as he pulls this lever and makes this impression, "God Reigns," that the document must be such a one as God approves.
>
> May every commission of every officer which bears the seal of this city be looked upon as solemn thing; that it is a commission to bear such authority, however small or great, as God's minister — God's minister in law—God's minister in the Eternal Covenant in a measure.

City of Zion, Minutes of First Meeting of City Council, May 6, 1902. Dowie later makes clear the meaning of each symbol in the emblem:

> Look at that Dove which is the emblem of the Holy Spirit, bearing the Message of Peace and Love over the seas. The Cross represents everything to us in Redemption, Salvation, Healing, Cleaning and Keeping Power.
>
> The Sword is the Sword of the Spirit, which is the Word of God.
>
> The Crown is the Crown of Glory, the Crown of Joy, the Crown of Righteousness, the Crown of Rejoicing.[1]

---

[1] The sword was later changed to a scepter.

Id. The City Council, all of whose members belonged to the Christian Catholic Church in Zion and the Theocratic Party, unanimously adopted the ordinance establishing the proposed seal as the official corporate seal of the City of Zion. In 1978 the city developed the logo, modelled on the city's seal, to affix to the Zion water tower.

III. DISCUSSION

A. Introduction

As we enter this Establishment Clause thicket, *see Doe v. Small,* 726 F.Supp. 713 (N.D.Ill.1989) (Shadur, J.), we look first to the Supreme Court's most recent guidance in *County of Allegheny v. American Civil Liberties Union,* ___ U.S. ___, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). As Judge Shadur notes, *County of Allegheny* reconfirmed the three part test in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), on which we rely to determine if the challenged government conduct is permissible. For a court to find a statute or government practice constitutional:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster "an excessive government entanglement with religion".

Id. 91 S.Ct. at 2111. The statute or practice must pass each of these three "tests" to be found constitutional.

B. Rolling Meadows

[1] The plaintiffs' concede that the Rolling Meadows seal does not violate the "purpose" and "entanglement" prongs of the *Lemon* test. We bear in mind that if any one of the three prongs is violated the seal is unconstitutional. It therefore behooves the defendant to agree that the seal does not violate the "purpose" and "entanglement" prongs. Yet, the defendant oddly insists we examine these "two crucial criteria."

We agree with the plaintiff that the seal does not violate the "purpose" and "entanglement" tests. Although the seal does not have a preamble revealing the purpose for its adoption, the

defendant submitted affidavits indicating the city adopted the seal for the purpose of celebrating the community's fifth anniversary. The designer of the seal was an eighth grader who swears, "I drew what I saw, [and] had no purpose other than to complete an assignment." An independent committee chose the seal as the winning entry. We conclude that the legislative purpose in adopting the seal was secular.

Nothing in the record suggests, and neither party argues, that the seal involves excessive entanglement with government.

The core issue is whether the seal's principal or primary effect is one that advances religion. *Lemon,* 91 S.Ct. at 2111. As the Supreme Court has noted, whether the verb we choose is "advance," "endorse," "favor," "prefer," or "promote," the principle is the same: "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny,* 109 S.Ct. at 3101 (*quoting Lynch v. Donnelly,* 465 U.S. 668, 104 S.Ct. 1355, 1366, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)).

The primary effect of the seal turns largely on the overall, "unique physical" context, *American Jewish Congress v. City of Chicago,* 827 F.2d 120, 128 (7th Cir.1987), in which the challenged religious symbol here, the cross,[2] appears. The Supreme Court has stated that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *County of Allegheny,* 109 S.Ct. at 3103. Based upon the context in which the cross appears in the Rolling Meadows seal, we find that the primary effect of the seal does not advance religion.

---

[2] We do not quibble with the plaintiffs over whether the challenged symbol is in fact a cross. The defendants counter with the experience of Robert Sherman, a Society of Separationists member and director of the Northern Illinois Chapter of Atheists, who abandoned his challenge to the Rolling Meadows seal. After researching the challenged symbol, Sherman concluded that the symbol was in fact a utility pole in an industrial setting. We conclude, for the purpose of the plaintiffs' summary judgment motion, that the symbol is a cross.

The challenged content of the seal, the cross, is a symbol of Christianity. *American Civil Liberties Union v. City of St. Charles,* 794 F.2d 265, 271 (1986). We are particularly sensitive that this symbol is "not only religious but also sectarian." *Id.*[3] This is of concern to us because "the more sectarian the display, the closer it is to the original targets of the [establishment] clause, so the more strictly is the clause applied." *Id.* We are also mindful that the municipal corporate seal in which the cross appears is not unlike City Hall, which is a "symbol of government power" and "marked with the stamp of government approval." *City of Chicago,* 827 F.2d at 128. We proceed with both of these concerns in mind.

In the context of the Rolling Meadows seal, the cross represents one aspect of the origin of the Rolling Meadows community. Each of the four pictures on the seal, including the cross, water tower, leaf, and school[4], suggests a different feature of the Rolling Meadows community as found on its fifth anniversary. Notably, the image that includes the cross appears as a scene: Although the cross obviously appears in a style that is more abstract than the way it would register on a photographic plate, we do not find that the image's level of abstractness renders the image, in the context of the other four images, as strong a symbol of Christianity (or religion) as would a lone or prominent cross. Although this distinction may appear to emanate from the offices of an interior decorator, *see City of Chicago,* 827 F.2d at 129 (Easterbrook, J., dissent), we find it relevant. While there is no doubt that a Latin cross is itself a symbol of Christianity, we conclude that the relation of the challenged image before us, in the context we receive it, to the referent at issue—religion, or more specifically, Christianity—is weak. We refrain from emphasizing this point too strongly because to the average observer of the Rolling Meadows seal there does appear a cross.

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[3] The seal varies slightly among its reproductions. The cross, which is obviously of most interest to us, is not uniform in all the seals. It is fair to say, however, that the cross appears as a Latin cross in each seal.

[4] The plaintiffs allege the lower quadrant of the seal contains a single-family residence. The defendants claim the building is in fact a school. This difference is not material to the decision of this court.

However, we must take the image as we see it in, not out of, context. *See* R. Arnheim, Visual Thinking 135-52 (1969).

The plaintiffs argue that the cross on the Rolling Meadows corporate seal is "large," "conspicuous," "prominent," and "massive." We do not agree. We hesitate to use adjectives to muddle the clarity of Exhibit A. However, as we noted, the cross is only one of several pictures that comprise the display on the seal. We find that the remaining pictures sufficiently "neutralize" the seal to avoid any religious massage a lone or a prominent cross, *City of St. Charles*, 794 F.2d at 267 (cross in display found "highly prominent"), would convey.

Were it not for the other symbols that surround the cross, the fact that the cross occupies a relatively small portion of the seal's space, and to a lesser extent, the fact that the cross appears in scene form, a nonadherent might consider the seal an endorsement of religion. This case would thus be indistinguishable from the cases in which the prominent display of a cross has been held unconstitutional. However, the seal before us cannot be fairly characterized as prominently displaying the cross. The question, as we understand it, is not whether a cross may appear in a municipality's seal; but rather, whether the context in which the cross appears has the effect of endorsing religion. There certainly may exist municipal seals that contain crosses and that convey messages endorsing religion.[5] This, however, is not one of those seals. There would be no meaningful difference between holding otherwise and holding that no municipal seal may contain a cross.

C. Zion

[2] The plaintiffs challenge Zion's seal, emblem, and logo.[6] Zion's corporate seal consists of the Zion emblem surrounded by the phrases "CORPORATE SEAL" and "CITY OF ZION, ILLINOIS." Zion's logo contains the same three symbols—a cross, a dove, and a crown with a scepter—found in the emblem,

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[5] See, for example, our discussion of the City of Zion's seal below.

[6] The plaintiffs also challenge an alleged motto of Zion's: "Where God Rules, Man Prospers." Zion denies having such a motto. To the extent Zion does not and will not use this motto the challenge is moot.

but does not appear in the form of a shield and does not contain a ribbon inscribed with the words "GOD REIGNS."

The defendants argue that the corporate seal, emblem, and logo have three secular purposes:

> First, the seal is required by state law to authenticate municipal records. Second, the seal, emblem and logo facilitate the identification of property with the municipality and identify the community itself. Finally, all three symbols commemorate the rich and unique historical heritage of Zion as an experiment in establishing a twentieth century utopian community.

Defendants' Motion for Summary Judgment at 2. The plaintiffs challenge the content of the seal (the emblem), not the validity of Zion's having a municipal seal. Therefore, the first and second of these alleged purposes are irrelevant. The third alleged purpose—that the historical significance of the city's founding outweighs the original religious purpose—is not without merit. The city was in fact a religious experiment and the seal, emblem, and logo recognize that origin. But it is clear that in adopting the Zion seal the Zion legislature sought to identify the City of Zion with the Christian Catholic Church and impart symbolically the values of the church. That purpose was blatantly sectarian at the seal's adoption.

The defendants argue that even if the orginal purpose of the city in adopting the seal were religious, the current, relevant purpose is historical, and therefore secular. We disagree with respect to the seal and the emblem. The defendants rely on *City of Chicago* for their proposition that "the original purpose of a government's use of a symbol has little if any relevance to an analysis of whether its current use has a secular purpose." Memorandum in Support of Defendants' Motion for Summary Judgment, at 5. However, *City of Chicago* involved a creche that the city erected and dismantled every Christmas season. The Seventh Circuit treated each season's creche display as involving a distinct decision made by the city. *City of Chicago*, 827 F.2d 120, 126 (mayor's 1959 comment "reveals little about the purpose of the 1985-86 display"). In the case before us, one legislative decision on May 6, 1902 adopted the city seal and emblem. The record shows the city has used essentially the identical seal and

emblem ever since. We thus find the relevant purpose was not secular. To support their contention that the relevant legislative purpose is found much later than in the Minutes accompanying the seal's original adoption, the city points to the Minutes of City Council, May 20, 1986, in which the City Council voted to retain the city seal in its current form for historical reasons. The Minutes do not clearly demonstrate that the Council's vote to retain the seal was motivated purely for historical purposes. In any event, and especially with respect to the later-developed logo, this issue is not dispositive because, as we discuss below, the effect of the seal, emblem, and logo is not secular.

In fact, the effect of the seal, emblem, and logo advances religion and violates the effects prong of the *Lemon* test. Regardless of whether one knows of the religious origin of the City of Zion and can discount the religious effect of the seal accordingly, the seal, emblem, and logo, as we discuss below, are sectarian. We do not impute complete knowledge of history to the average observer of the seal—whether adherent or nonadherent. We therefore cannot assume that the average member of Zion's political community will have either general or specific knowledge of Zion's "unique" history. In fact, the defendants' own expert on the history of the City of Zion, Professor Philip Cook, stated otherwise: "it is possible that the majority of Zion's 15,000 inhabitants know little of its unique history." Affidavit of Philip L. Cook, at 4. We therefore find that the average observer would consider that Zion makes adherence to religion relevant to a person's standing in the political community.

The defendants are not correct when they assert that the symbols in the seal and logo "*merely* recognize Zion's early religious history" (emphasis added). Nothing within the four corners of the seal or the logo detracts from their sectarian messages. The symbols in question are abstract and function as strong symbols of a particular sect of Christianity. As Reverend Dowie indicated, each of the three symbols has an independent religious significance. The sum of the individual symbols imparts a decidedly religious, in fact sectarian, message. The seal, containing the emblem, connotes an even stronger message because the symbols appear on a shield below a ribbon that

reads "GOD REIGNS." Nothing "neutralizes" the religious message.

The First Amendment declares that "Congress shall make no law respecting an establishment of religion. . . . " The Supreme Court and the Seventh Circuit precedents teach that a municipality may not display religious symbols in a way that endorses religion. We find that the City of Zion's seal, emblem, and logo have the effect of endorsing a Christian message. Nothing more is required to demonstrate a violation of the Establishment Clause. *County of Allegheny,* 109 S.Ct. 3086, 3105. We therefore permanently enjoin the display of the City of Zion's seal, emblem, and logo in their current forms.

IV. CONCLUSION

We deny the plaintiffs' summary judgment motion in *Kuhn v. Rolling Meadows.* We grant the plaintiffs' summary judgment motion as to the Zion seal, emblem, and logo and deny the defendants' summary judgment motion in *Harris v. City of Zion.* We permanently enjoin the City of Zion from the continued use of its seal, emblem, and logo in their present forms.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate JAMES B. ZAGEL

Case Number 87 C 7205

Date 22 Feb 90

Case Title KUHN V. CITY OF ROLLING MEADOWS

(1) [XX] Judgment is entered as follows:

The Defendants' motion for summary judgment is granted. In accordance with the Memorandum Opinion and Order dated February 9, 1990, we do not consider the defendants' earlier failure to move for summary judgment reason to delay entering such order.

[X] Docketing to mail notices.

Document # 105

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate ZAGEL

Case Number 87 C 7205

Date March 13, 1990

Case Title KUHN V. CITY OF ROLLING MEADOWS

MOTION: For Summary Judgment

(1) [X] Judgment is entered as follows:

Defendant's motion for summary judgment is granted. Enter summary judgment in favor of defendant City of Rolling Meadows and againt plaintiff Kuhn.

[X] Docketing to mail notices.

Document # 106

Supreme Court, U.S.
FILED
AUG 9 1991
OFFICE OF THE CLERK

(2)

No. 91-141

In The Supreme Court of the United States October Term, 1991

CITY OF ROLLING MEADOWS, MAYOR OF ROLLING MEADOWS and CITY COUNCIL OF ROLLING MEADOWS,
Petitioners,

v.

THEODORE M. KUHN and the SOCIETY OF SEPARATIONISTS, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD MARTIN GUTMAN
54 Parker Street
Carlisle, PA 17013-2818
(717) 243-2286
(717) 243-8894
Counsel of Record

RICHARD GROSSMAN
135 S. LaSalle Street
Suite 1540
Chicago, IL 60603
(312) 641-6777
Counsel for Respondents

August, 1991

QUESTION PRESENTED

Does the First Amendment prohibit a pervasive municipal seal which permanently identifies that municipality with one particular religion, in preference to all other religions?

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No. 91-141

In The Supreme Court of the United States October Term, 1991

CITY OF ROLLING MEADOWS, MAYOR OF ROLLING MEADOWS and CITY COUNCIL OF ROLLING MEADOWS,
Petitioners,

v.

THEODORE M. KUHN and the SOCIETY OF SEPARATIONISTS, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The Petition omitted that the March 19, 1991 opinion of the United States Court of Appeals for the Seventh Circuit was reported at 927 F.2d 1401 (7th Cir. 1991).

STATEMENT OF THE CASE

City petitioners' Statement of the Case omits the following:

The City has admitted that the seal pictures the Christian Cross in front of the Community Church of Rolling Meadows, a leaf, a single-family residence and a water tower

with two industrial buildings (R.76, Plaintiffs' Statement of Material Facts, ¶14; R.80, 81; R.82, Att.K-1,-2).

According to a publication of City petitioners, "The Cross in the City's seal symbolizes the importance of religious activity" (R.76, Ex.7).

The Community Church of Rolling Meadows and its Cross depicted on the seal were not the first or oldest existing church building and Cross in Rolling Meadows (R.82, Atts.I-L). There is no evidence in the record that the church or Cross depicted on the seal has any historical, architectural or artistic significance to the City of Rolling Meadows (R.80, 81).

The Rolling Meadows city seal does not include the symbols of any religion or philosophy other than Christianity (Petition, p.3).

In addition, City petitioners inaccurately state that their city seal was drawn by a child. In fact, city petitioners commissioned an artist, Carl Bergland, to draw the seal, based upon the child's design (R.81, Ex. B). Mr. Bergland substantially changed the child's drawing by replacing a picture of a bird with an industrial scene and by replacing a picture of a tree with a leaf (3a).

The City's Petition also omits the fact that the seal is found on the residents' garbage sacks (4a). Also, while City petitioners now deny that the seal appears on fire trucks, they admitted in their Answer to the Complaint that, "The emblem or seal is painted on all City-owned vehicles..." (R.76, Complaint¶16, Ans. ¶16;3a).

REASONS FOR DENYING THE WRIT

The Petition raises two issues regarding standing: (1) Are respondents' allegation of mere psychological injury legally sufficient? and (2) Need respondents prove the truth of their allegations? Neither issue is presented in this litigation because (1) respondents alleged more than psychological injury and (2) respondents did prove the truth of their

allegations. Moreover, City petitioners have twice waived issue (2) by failing to raise it both in the district court and in the appellate court. (Question (1) can be raised by a party at any time or by the court *sua sponte.*)

As to the First Amendment issue, a pervasive municipal seal which continuously identifies the municipality with one particular religion, in preference to all other religions or philosophies, violates the Establishment Clause. Moreover, City petitioners have not cited any judicial decision upholding the constitutionality of government seals featuring sectarian religious imagery. Finally, City petitioners have submitted no evidence that sectarian government seals or resulting litigation occurs with any frequency.

I. STANDING

A. This Case Does Not Present The Issues Raised By Petitioners

The Petition raises two questions regarding standing: (1) Are respondents' allegations of mere psychological injury legally sufficient in Establishment Clause litigation? and (2) need respondents only allege the required elements of standing or must they prove them? But neither question can be at issue here since (1) respondents' allegations of standing went well beyond mere psychological injury and (2) the factual bases of respondents' allegations of standing were proved twice when City petitioners twice admitted them.

In addition to mere psychological injury, respondent Kuhn also alleged alteration of behavior. The Third Amended Complaint (R.34) alleged that

> 7. Mr. Kuhn avoids the use of any public property in the City of Rolling Meadows. This includes the Chamber of City Hall as well as all other public buildings and offices;
>
> 8. Mr. Kuhn has stated that he mightily strives to avoid any visual contact with the seal of the City of Rolling Meadows. He will often avoid using the route

> to the downtown area of Rolling Meadows, which is also a primary and often traveled route to the City of Chicago, where the seal of the City of Rolling Meadows is most prominently displayed.

In addition, respondent Kuhn attached to his motion for summary judgment (R.76) his affidavit[1] alleging the following:

> 5. In order to avoid seeing the Rolling Meadows Seal, I avoid public offices of the City of Rolling Meadows such as the City Hall and the Public Works Building.
>
> 6. In order to avoid contact with the Rolling Meadows Seal, I attempted to use a garbage bag without the Rolling Meadows Seal, but the City refused to pick up the garbage because it was not in an official Rolling Meadows garbage bag with the Rolling Meadows Seal.
>
> 7. In order to avoid contact with the Rolling Meadows Seal on my motor vehicle tax sticker, I avoid looking at the right side of my car's windshield.

The appellate decision expressly stated "that the plaintiffs may be offended by the seals of Rolling Meadows and Zion does not confer standing" (9a). Rather the appellate court in establishing standing relied upon respondent Kuhn's alleged injuries which were more concrete than mere psychological injury (9a, 13-17a). Thus, this lawsuit does not present the issue raised by petitioners as to the legal sufficiency of allegations of mere psychological injury.

Similarly, respondent Kuhn did prove the truth of his allegations of standing. As described above, respondents' motion for summary judgment included an affidavit by respondent Kuhn containing his detailed allegations of

---

[1] The plaintiff's standing is established by the injury allegations either of the complaint or of affidavits. *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 65(1987).

standing (R.76). Despite having taken respondent Kuhn's deposition, City petitioners never submitted any affidavit or other evidence disputing any of the aforementioned alleged facts of Kuhn's affidavit. Therefore, as the appellate court noted (12-13a), Federal Rule of Civil Procedure 56(e) mandates that respondents' uncontested factual allegations be taken as proved.

Moreover, City petitioners, as a matter of law, admitted the truth of respondent Kuhn's allegations of standing on another and independent basis. Respondents' October 25, 1988 Motion For Summary Judgment's Statement of Material Facts stated:

> 7. In order to avoid seeing the Rolling Meadows Seal, plaintiff Kuhn avoids public offices of the City of Rolling Meadows such as the City Hall and the Public Works Building.
>
> a. Kuhn affidavit
>
> 8. In order to avoid contact with the Rolling Meadows Seal, plaintiff Kuhn attempted to use a garbage bag without the Rolling Meadows Seal, but the City refused to pick up that garbage because it was not in an official Rolling Meadows garbage bag with the Rolling Meadows Seal.
>
> a. Kuhn affidavit
>
> 9. In order to avoid contact with the Rolling Meadows Seal on his motor vehicle tax sticker, plaintiff Kuhn avoids looking at the right side of his cars' windshield.
>
> a. Kuhn affidavit (R.76).

In response to respondents' Statement of Material Facts, City petitioners did not file any controverting statement of material facts (R.80). United States District Court for the Northern District of Illinois General Rule 12(m) mandates that "All material facts set forth in the statement required

of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party."

Since City petitioners twice admitted the truth of respondent Kuhn's allegations of standing, this case does not present the issue of the legal consequences of a plaintiff's failure to prove allegations of standing.

B. City Petitioners Have Waived Standing Issue (2)

Moreover, the City twice waived the issue as to the factual basis of respondents' allegations of standing by failing to raise it both in the district court and the appellate court. (While the legal sufficiency of plaintiff's allegations of standing can be considered by a court *sua sponte* at any time during litigation, any challenge to the factual basis of those allegations must be made by defendants in the district court and then again in the appellate court.) As this Court has noted, "...if the plaintiffs' 'allegations [of standing] were in fact untrue, then the [defendants] should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact.' " *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987), quoting *United States v. SCRAP*, 412 U.S. 669, 689 (1973).

City petitioners filed in the district court a motion for summary judgment (R.109), but did not include in that motion, or in any other filing, any challenge to the factual basis of respondents' standing. The Petition emphasizes that in the district court City petitioners challenged respondents' standing, but those challenges were always to the legal sufficiency of respondents' allegations of standing, never to the truth of respondents' allegations of standing. Nor did the City petitioners at any time during its appeal challenge the truth of respondents' allegations of standing. Thus, City petitioners have twice waived the issue as to the factual basis of respondents' allegations of standing and can not raise it for the first time in their petition for a writ of certiorari.

II THE ESTABLISHMENT CLAUSE

A. The Result Was Correct Because The City Seal Officially Identifies The City Continuously With One Particular Religion.

The Rolling Meadows Seal selects for depiction four of the multitudinous aspects of that community. One of those four aspects featured is Christianity, represented by its principal symbol, the Christian Cross. The seal does not depict the symbols of any other religions (or any secular philosophy). Furthermore, the seal of Rolling Meadows is the official symbol of that municipality. A reasonable observer views the permanent placement of the Christian Cross on such a seal as communicating that the Rolling Meadows municipality honors and identifies with one religion and one religion only---Christianity. Moreover, this sectarian seal is observable throughout the City.

Such a dramatic symbolic union of (one particular) church and state is unconstitutional under even the most restrictive interpretation of the reach of the Establishment Clause. Even those who would overturn the standard of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and would permit governmental preference for religion over irreligion and nondiscriminatory aid to religion, affirm that the Establishment Clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations." *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (J. Rehnquist, dissenting). The case at bar involves government preference among religions.

If the City's seal were constitutional, government bodies throughout the nation could officially identify themselves exclusively with Christianity, thereby ordaining an officially-preferred religion.

B. City Petitioners Have Not Cited Any Conflicting Lower Court Decision.

Petitioners have not cited a single federal district court

or appellate decision finding constitutional sectarian religious imagery on a government seal. On the contrary, in *Friedman v. Board of County Commissioners, Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (in banc), the Tenth Circuit Court of Appeals in banc held that the Christian Cross on the Bernalillo County seal violated the Establishment Clause despite the historical significance of Catholicism in the founding of that New Mexico county. This Court denied a resulting petition for a writ of certiorari at 476 U.S. 1169 (1986).

C. Petitioners Have Not Cited Any Conflicting Supreme Court Decision

City Petitioners are unable to cite any Supreme Court decision holding constitutional sectarian religious symbols on government seals.

On pages 18-19 of its Petition, the City notes that in this Court's most recent Establishment Clause decision, four justices expressed misgivings regarding the *Lemon* test. *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 655-56, 109 S.Ct. 3086, 3134 (1989) (Kennedy, J. dissenting). But even those four dissenting justices favorably cited the aforementioned Bernalillo County, New Mexico seal decision and indicated that they would hold unconstitutional a Christian Cross continuously and obstrusively affixed onto a symbol of government power. In Justice Kennedy's words,

> Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. *Cf. Friedman v. Board of County Comm'rs*

of Bernalillo County, 781 F.2d 777 (CA 10 1985) (en banc) (Latin cross on official county seal).

Id., 492 U.S. at 661, 109 S.Ct. at 3137. Therefore, even if a majority of this Court wished to overturn the *Lemon* standard, this case would not present a suitable opportunity to do so.

D. Sectarian Religious Imagery on Government Seals Rarely Occurs and Has Generated Few Lawsuits

City petitioners have not established that this litigation is of national significance. There is no evidence that the federal government has ever placed sectarian religious symbols on its governmental seals. Nor have City petitioners demonstrated what percentage of local and state seals contain sectarian religious imagery. Certainly, few lawsuits have concerned this subject matter.

City petitioners argue that his litigation has ramifications for all Establishment Clause litigation. Yet the factual circumstances here combining (1) the principal symbol of one and only one particular religion, (2) permanently joined with (3) the official symbol of government power, and (4) pervasively displayed throughout the jurisdiction are rarely equaled in Establishment Clause litigation.

Certainly, the logic of the Seventh Circuit decision does not apply to factual situations in which the government is not discriminating among religions. Nor does it apply to situations in which the government is not closely identifying itself with religion. Thus the logic of the appellate decision does not prohibit the city name St. Louis, which, unlike the Christian Cross, has lost its religious connotations in popular understanding. Nor does it apply to nonsectarian prayer. Nor to prayer which is not perceived as being officially identified with the government.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

RICHARD MARTIN GUTMAN
54 Parker Street
Carlisle, PA 17013-2818
(717) 243-2286
(717) 243-8894
Counsel of Record

RICHARD GROSSMAN
135 S. LaSalle Street
Suite 1540
Chicago, IL 60603
(312) 641-6777
Counsel for Respondents

August, 1991